Supreme Court, U.S.
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No. _____

In The
Supreme Court of the United States

AIR CONDITIONING TRADES ASSOCIATION UNILATERAL APPRENTICESHIP COMMITTEE, DESMOND CAPERS, DUANE TREVETHEN, DIANE NESS, ERIC KENDALL, JENNIFER BATTS AND JUSTIN GARCIA,

Petitioners,

v.

CALIFORNIA APPRENTICESHIP COUNSEL AND THE DIVISION OF APPRENTICESHIP STANDARDS, HENRY P. NUNN,

Respondent,

SHEET METAL WORKERS' INTERNATIONAL ASSOCIATION LOCAL NOS. 104, 105 AND 162,

Real Parties In Interest.

On Petition For A Writ Of Certiorari To The California Supreme Court

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. May the State of California mandate a local residency requirement for admission to a private educational institution?

2. May the State of California forbid a private educational institution from advertising for admission to non-residents?

3. May a California state administrative agency, such as the California Apprenticeship Council ("CAC") restrict a private educational institution, such as Petitioner Air Conditioning Trades Association Bilateral Training Committee, from recruiting applicants to its program based upon the geographical preferences of another, competing educational program, thereby "rationing" education and denying the individual Petitioners access to information in violation of constitutional guarantees of freedom of speech, privileges and immunities, freedom to access **private** education, right to engage in a common occupation, right to travel and equal protection of law?

PARTIES TO THE PROCEEDING

Pursuant to Rule 14.1(b), the following list identifies all of the parties appearing here and before the California Court of Appeals.

The Petitioners here and appellants below are the Air Conditioning Trades Association Unilateral Apprenticeship Program, Desmond Capers, Duane Trevethen, Diane Ness, Eric Kendall, Jennifer Batts and Justin Garcia.

The Appelles below are the California Apprenticeship Council, Division of Apprenticeship Standards, Henry P. Nunn.

Real Parties in Interest here and below are the Sheet Metal Workers' International Association Local Nos. 104, 105 and 162.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6, Petitioners State as follows:

Air Conditioning Trades Association Unilateral Apprenticeship Program is an unincorporated non-profit trade association with no parent or subsidiaries.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners request that a writ of certiorari issue to review the final order of the California Supreme Court.

OPINIONS BELOW

The opinion of the California Court of Appeals in *Capers v. Nunn*, is unpublished, but available at 2004 Cal. App. Unpub. LEXIS 8094 (California Unpublished Opinions, 2004) and reproduced in the appendix at App. 1. The California Supreme Court order denying Petitioners' petition for review is reproduced in the Appendix at App. 60. The Sacramento County Superior Court opinion is unreported and is reproduced in the Appendix at App. 22.

JURISDICTION

On September 1, 2004, the California Court of Appeals affirmed the judgment of the Superior Court of Sacramento County, upholding the order of the California Apprenticeship Counsel prohibiting the Air Conditioning Trade Association Unilateral Apprenticeship Program from recruiting or indenturing applicants for apprenticeship who are not residents of a four-county area in California. On November 17, 2004, the California Supreme Court denied review. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1257(a) (2005) and the United States Constitution, Article III, Section 2, subsection 2.

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

This case involves provisions of the United States Constitution, including the Privileges and Immunities Clause of Section 2 of Article IV and the First and Fourteenth Amendments. It also involves CAL. LAB. CODE §§ 1777.5, 1777.7, 3075, 3077 and CAL. CODE REGS. tit. 8, Article 1A, I-X, §§ 200-234.2.

I. INTRODUCTION

Ever since the decision of this court in the case of *California Div. of Labor Standards Enforcement v. Dillingham Constr., N. A., Inc.*, 519 U.S. 316, 136 L. Ed. 2d 791, 117 S. Ct. 832 (1997) (*Dillingham*), where this Court limited the protection provided apprenticeship programs by the preemption clause to the Employee Income Security Act, 29 U.S.C. § 1144(a) (2005), the State of California has devised and revived various methods to curtail apprenticeship opportunities to new programs, thereby creating a monopoly on private education in favor of existing programs. The State of California has always mandated the employment of state approved apprentices on all California Public Works projects.[1] After the Court's

[1] At oral argument in *Dillingham*, the State of California represented that CAL. LAB. CODE §§ 1777.5 and 1777.7's requirement to employ apprentices on all California public works statutes was not enforced and/or discretionary. That is not the case. CAL. LAB. CODE § 1777.5 (Deering 2004) has always required the employment of state approved apprentices on public works construction, and contractors are required by law to inform state approved apprenticeship programs of all public works jobs in order to facilitate dispatch of apprentices. CAL. CODE REGS. tit. 8 § 230.1(a) (2004) states, "Contractors, as defined in Section 228 to include general, prime, specialty or subcontractor, shall

(Continued on following page)

decision in *Dillingham*, California enacted legislation and regulations allowing existing apprenticeship programs to veto accreditation of any new program or to block any program expansion. CAL. LAB. CODE § 3075(a) (Deering 2004) requires that any new program (and by regulations at CAL. CODE REGS. tit. 8 § 212.2(a) (2004), an expansion of an existing program is considered a new program) must demonstrate a "need" for the program, and a 1999 amendment of this statute added subsection b, which states:

> For purposes of this section, the apprentice training needs in the building and construction trades shall be deemed to justify the approval of a new apprenticeship program only if any of the following conditions are met: (1) There is no existing apprenticeship program approved under this chapter serving the same craft or trade and geographic area. (2) Existing apprenticeship programs approved under this chapter that serve the same craft or trade and geographic area do not have the capacity, or neglect or refuse, to dispatch sufficient apprentices to qualified employers at a public works site who are willing to abide by the applicable apprenticeship standards. (3) Existing apprenticeship programs approved under this chapter that serve the same trade and geographic area have been identified by the California Apprenticeship Council as deficient in meeting their obligations under this

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employ registered apprentice(s), as defined by Labor Code § 3077, during the performance of a public work project in accordance with the required 1 hour of work performed by an apprentice for every five hours of labor performed by a journeyman, unless covered by one of the exemptions enumerated in Labor Code Section 1777.5 or this subchapter."

chapter. CAL. LAB. CODE § 3075(b) (Deering 2004).

Petitioners Air Conditioning Trade Association Joint Apprenticeship Committee (hereinafter referred to as "ACTA") and individuals Desmond Caper, Duane Treventhen, Diane Ness, Eric Kendall, Jennifer Batts and Justin Garcia (hereinafter collectively referred to as "Petitioners") seek to challenge this limitation on access to private education in the coordinated case of *Capers, et al. v. Nunn* and *ACTA v. CAC*, 2004 Cal. App. Unpub. LEXIS 8094 (California Unpublished Opinions, 2004)[2] where the Court affirmed an order of the California Apprenticeship Council denying future applicants to ACTA the right to apply for and to be indentured into the ACTA program based solely upon their place of residency **at time of application**. The decision further ordered ACTA to cease and desist from "recruiting apprentices or utilizing selection methods that result in the recruitment or enrollment of apprentices" from outside certain geographic areas. The decision retroactively applies the regulations at CAL. CODE REGS. tit. 8 § 212.2(a) (2000)[3] to all the "newer" unilateral programs. The regulation states:

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[2] The California Court of Appeals affirmed the January 28, 2003 judgment of Superior Court Judge Lloyd G. Connelly, who affirmed the January 24, 2002 decision of the California Apprenticeship Counsel ("CAC") that affirmed the July 19, 2001 decision of the Administrator of Apprenticeship of the State of California, Department of Industrial Relations. The California Supreme Court denied review on November 17, 2004.

[3] Ironically, this is an even more restrictive version of the same section of the regulations previously declared preempted by the California Supreme Court in *Southern Cal. Ch. of Associated Builders Etc. Com. v. California Apprentices Committee*, 4 Cal. 4th 422, 841 P.2d 1011, 14 Cal. Rptr. 2d 491 (1992) (*So. Cal. ABC*) cited with approval in *Dillingham*, 519 U.S. 316.

> To be eligible for approval, a program must comply with all applicable federal and state law and regulations. A revision to change the program's occupation or to change the program's geographic area of operation to include a different labor market area is subject to the same application and approval process set out in (a)-(j) of this section for approval of a [new] program, including providing notice of the proposed revision and an opportunity for comment to existing programs in the same apprenticeable occupation in the labor market area. CAL. CODE REGS. tit. 8 § 212.2(a) (2000).

The catch-22 facing all newer programs is that they cannot expand without seeking apprentices beyond the counties they first began operation and they cannot amend the SMSA (standard metropolitan statistical area) to add counties for which they have not been approved. Approval is impossible because any existing program will say it is underutilized in order to prevent a new program from competing with it, even if the underutilization was caused by market forces favoring the new program. Thus, the regulations and the order combine to deny ACTA and many other apprenticeship programs an opportunity to recruit apprentices from out of state and/or out of area, although it was acknowledged once indentured, the apprentice could live and work state-wide without restriction.

This case has impact well beyond the field of apprenticeship. If the State can limit access to a privately funded educational institution in favor of other privately funded educational institutions based upon the residence of applicants at the time of application, then no student can travel to go to a private college, and no college can admit students from areas beyond its political influence. Harvard

could block Yale from accepting any student who applies from Massachusetts, for example, for fear that Massachusetts will fail to recognize all Yale graduates for any occupational licensing pre-requisites, and the City Council of New Haven, Connecticut could do the same to any graduate of Harvard. While there may not be a right to public education, the First Amendment protects the right of potential students to attend the private educational institution of their choice regardless of location.

This appeal asserts the fundamental right to be solicited by and to enter a private educational work-study program based solely upon the county of residence of the applicant without a compelling state interest. Education is not a product that the state can ration, like liquor, but is a form of protected speech. The regulation of private educational attendance is no different in concept than if the state refused to allow more than one newspaper in a town or city. This appeal embraces Constitutional claims of the right to access education under the First Amendment, the right of Equal Protection and Privileges and Immunities of both the Fourth and Fourteenth Amendment, as well as Article IV, Section 2 of the Constitution.

Although Petitioner urges a strict scrutiny test should have been applied to this abridgement of multiple fundamental rights, there is no rational relationship between the CAC's order and any legitimate purpose of government, simply because the order is directed at applicants for admission rather than those who are already admitted. There are no comparable regulations for apprentices once they are admitted to the program, showing that all justifications for residency requirement for admission to be a pretext to discriminate and exclude based upon residency.

For the reasons more fully articulated hereinafter, Petitioners request the reversal of the judgments of the California Court of Appeals and by the Hon. Lloyd G. Connelly affirming the decision of the CAC in these cases.

II. STATEMENT OF THE CASE

A. STATEMENT OF FACTS

ACTA is an unincorporated business entity in California lawfully existing as the sponsor of an apprenticeship program for training apprentices statewide in the air conditioning trades craft under the instructional supervision of the California Department of Education and with on-the-job training in accordance with applicable federal and California Apprenticeship criteria and approved by the California Apprenticeship Council, pursuant to CAL. LAB. CODE § 3075 (Deering 2004) and CAL. CODE REGS. tit. 8 § 205 (2004). ACTA is a private, not public, apprenticeship training program where its members are not party to a collective bargaining agreements with any labor organization. It is referred to as a "unilateral training committee" under federal Apprenticeship Regulations,[4] while union programs are called "joint" programs.[5] The quality of the education or the content of the course work is not at question, as ACTA is allowed to solicit in four California Counties, and once indentured, its apprentices can live and work state-wide.

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[4] *See*, 29 C.F.R. § 29.2(i) (2005).

[5] All union plans are called joint apprenticeship committees and must be jointly administered because Section 302(c) of the Taft-Hartley Act, 29 U.S.C. § 186(c) (2005).

Petitioners Desmond Caper, Duane Treventhen, Diane Ness, Eric Kendall, Jennifer Batts and Justin Garcia are potential apprentices who wish to be enrolled, and have been accepted to be indentured as apprentices in the ACTA apprenticeship program, but cannot be indentured because the California Division of Apprenticeship Standards, Division of Industrial Relations ("DAS") will not sign their completed indenture certificates. The DAS will not sign their indenture certificates, which is necessary for them to being recognized as apprentices, because the address listed on their application form is not within the four California counties which are listed in an addendum to the ACTA apprenticeship standards as the SMSA for measurement of Affirmative Action goals. The DAS does not argue that this limitation on geographic recruitment is in furtherance of these affirmative action goals, as indeed it would facilitate diversity if the program could recruit from a wider area where more minorities may be located. And the DAS does not consider adding new counties to the SMSA in the affirmative action addendum a mere ministerial act, but one requiring application as if the program were a new program. And, as stated before, the regulations assure that the new SMSA will never be approved because of the veto power of the pre-existing and competing educational institutions, the joint apprenticeship programs.

The ACTA standards' affirmative action addendum states on page 1 "Area Covered by Standards and Approved Statistical Area Mariposa, Merced, Stanislaus and Tuolumne Counties." The purpose of this statistical area is to measure the percentage of minority participation in the program, as compared to the minority population of the area where the program is operating. In its July 14, 1993 final enforcement policy issued by then-Chief DAS Gail

Jesswein, which under a section entitled "Geographic Area", stated " . . . in existing standards, a statement of geographic area for recruitment, and within which R&SI [related and supplemental instruction] classroom training occurs, should be updated when the area of those activities expands." App. 106. ACTA has no issue with updating the geographic reference automatically to reflect the area of operation as the program evolves. But, instead, this requirement is being used to limit the operations of the program to recruiting only in the area where the program initially operated over ten years ago.

B. PROCEDURAL HISTORY: DAS & CAC

ACTA was one of the "new" apprenticeship programs made possible when the California Supreme Court determined that the former CAC regulation 212.2 (CAL. CODE REGS. tit. 8 § 212.2 (1990)), which required a demonstration of "no adverse impact" was unconstitutional as preempted by ERISA, and not saved by the Fitzgerald Act (29 U.S.C. § 50 (1992), and 29 C.F.R. § 29 (1992)) in *So. Cal. ABC*, 4 Cal. 4th at 453 ("We conclude that the portion of section 212.2(a), which provides that an apprenticeship program may be denied approval when existing prevailing conditions would be lowered or adversely affected in the area and industry in which the program plans to operate, is not 'saved' from preemption by ERISA."). ACTA received state approval a little more than a year after the California Supreme Court decision in *So. Cal. ABC*.

In 1995, the CAC regulations were amended to require apprenticeship program standards to state "the parties to whom the standards apply and the program sponsor's labor market area, as defined by Section 215

appendix 2(l), **for purposes of meeting equal employment opportunity goals** in apprenticeship training." (CAL. CODE REGS. tit. 8 § 212(b)(2) (1995)). (Emphasis added). Soon after it began operations, ACTA was besieged with requests to train apprentices far beyond its original four California County area. On or about February 7, 1994, the DAS rejected complaints by Real Party in Interest that ACTA was training out of the area approved in its original standards. ACTA continued to expand statewide and kept the DAS informed of its operations constantly. The CAC regulations specifically provide that an apprenticeship program is not restricted to a local area of coverage and may provide for local, regional or statewide coverage in its standards. CAL. CODE REGS. tit. 8 § 218 (2004).

In fear of continued complaints from Real Party that it was "operating outside its area," ACTA requested program expansion statewide. Beginning in 1994, the DAS repeatedly told ACTA both verbally and by copy of correspondence, that ACTA did not need to amend its standards as it was empowered to operate statewide already and for that reason, none of its submissions for expansion were processed by the DAS. In response to continued union complaints, and concerns by Petitioner ACTA regarding its ability to recruit state-wide, DAS employee Len Viramontes wrote a letter dated September 18, 2000 stating:

> On behalf of the State of California Department of Industrial Relations/Division of Apprenticeship Standards, this letter is to certify that Air Conditioning Trades Assoc. (ACTA), is a state approved apprenticeship training facility, with coverage consisting of the entire State of California, since 1994. App. 100.

Appellant ACTA attempted to update its standards by filing various revisions with the DAS, called DAS form 24's, which were signed by the DAS consultant assigned to ACTA, but never returned by the Chief of the DAS, either approved or disapproved in a timely manner.[6] In December 2000, ACTA again submitted a completed, revised set of standards for statewide geographic jurisdiction to the DAS, using the exact language and form supplied by the employees of the DAS. The DAS employee **again** signed off on the revised standards on December 22, 2000, and submitted it to Respondent DAS Chief, who never signed the standards, nor rejected them, although it was far in excess of the 30 days for correction under CAL. CODE REGS. tit. 8 § 212.2(c) (2000) and/or the 90 days for approval referred to in CAL. CODE REGS. tit. 8 § 212(i) (2000).

However, on July 19, 2001, the DAS decided that although ACTA can train statewide, it could not recruit or solicit for indenture outside the four California County area in its SMSA Affirmative Action addendum simply because, it appears, the DAS Chief never personally signed the revision to the standards approving statewide training.[7] App. 67. The DAS had been signing DAS-1 forms for ACTA apprentices who listed their address outside the four California county area all this time, and the DAS also signed DAS-7 forms approving ACTA employers to perform on-the-job training with statewide geographic coverage since 1994. Ironically, ACTA could train statewide, but could not solicit students statewide or from other states.

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[6] As specified in CAL. CODE REGS. tit. 8 § 212 (2004).

[7] Actually, nobody knows if they were signed or not, but it is clear that they were never returned signed and the DAS declares it cannot find any record of the amendments being signed.

On January 24, 2002, the CAC adopted the July 19, 2001 DAS decision and ordered ACTA to restrict applicants to its private educational program for apprenticeship training based upon the county of residence of the applicant. App. 61, 65. ACTA sought review of the CAC decision by the Superior Court, as the CAC decision is contrary to State and federal law.

C. PROCEDURAL HISTORY: SUPERIOR COURT

On November 1, 2001, six potential ACTA apprentices (Desmond Capers, Duane Trevethen, Diane Ness, Eric Kendall, Jennifer Batts and Justin Garcia) filed an action entitled *Capers et al v. Nunn,* case no. 01 CS01561 in the Sacramento Superior Court, also on appeal to this court, case no. C043358, seeking a writ to force Respondent Henry Nunn, in his official capacity, to cease refusing to execute a DAS-1 form acknowledging their indenture into the ACTA apprenticeship program solely on the basis of their place of residency. The *ACTA v. CAC, DAS* case was consolidated with the case of *Capers et al v. Nunn*, in the Superior Court of California, County of Sacramento on October 4, 2002. A hearing was held before the Honorable Lloyd G. Connelly on January 10, 2003, where the matters were heard together. Judge Connelly presented his findings from the bench and issued an order against both ACTA and the individual "Capers" applicants. App. 22.

D. PROCEDURAL HISTORY: CALIFORNIA COURT OF APPEAL

On September 1, 2004, the Third Appellate District Court of Appeal issued a decision in the consolidated cases affirming the trial court's decision. App. 1.

E. PROCEDURAL HISTORY: SUPREME COURT OF CALIFORNIA

On October 4, 2004, Petition filed a Petition for Review of the California Court of Appeal's decision. Petitioners' Petition for Review was denied on November 17, 2004. App. 60.

IV. REASONS FOR GRANTING THE WRIT

A. THE CALIFORNIA COURTS ERRED BY HOLDING THAT ONLY A DURATIONAL RESIDENCY REQUIREMENT IS UNCONSTITUTIONAL WHEN APPLIED TO THE MERE APPLICATION FOR ADMISSION TO A PRIVATE EDUCATIONAL INSTITUTION

The United States Constitution, Fourteenth Amendment states in part "[n]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States[.]" The California Constitution Article 1, Section 7(b) states "[a] citizen or class of citizens may not be granted privileges or immunities not granted on the same terms to all citizens. Privileges or immunities granted by the Legislature may be altered or revoked." The State of California has a Constitutional obligation to assure that members of the same class of citizens are treated similarly. *See*, *Benjamin v. Ricks*, 63 Cal. App. 3d 393, 133 Cal. Rptr. 745 (1976). Statutes or regulations cannot operate in a discriminatory manner against out-of-state business merely because of their presence outside of the area. *Associated Indus. of Mo. v. Lohman*, 511 U.S. 641, 647, 114 S. Ct. 1815, 128 L. Ed. 2d 639 (1994), *quoting New Energy Co. of Ind. v. Limbach*, 486 U.S. 269, 273, 108 S. Ct. 1803, 100 L. Ed. 2d 302

(1988). The rules are the same for out-of-county operations under California Constitution Article 1, Section 7(b). *Cooperrider v. Civil Service Comm'n*, 97 Cal. App. 3d 495, 158 Cal. Rptr. 801 (1979) (*Cooperrider*).

The Court of Appeal agreed that the order of the CAC requiring ACTA to cease and desist admitting people who live outside the four Northern California Counties at the time they make application to the program is first and foremost a residency requirement, but incorrectly concluded it was subject only to a rational basis test because it was not a durational residency requirement. The sole purpose of this residency requirement is to discourage applicants from outside the area from being accepted into the program, and therefore applicants will not relocate to the area to attend school. The Court of Appeals did not recognize any First Amendment right for a student to choose a school of his or her choice, nor did it apply a Privileges and Immunities test as opposed to an equal protection analysis. Any "bona fide" residency requirement, no matter how short, would be unconstitutional under Equal Protection and First Amendment analysis, as well, if its sole purpose was to prevent the travel of people to attend a lecture, or series of lectures, which make up an educational program such as the ACTA apprenticeship related and supplemental training.[8] Because the sole motive of the restriction is attainment of an unconstitutional goal of limiting access to education, no residency requirement can be justified.

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[8] At the time, ACTA had contracted with various community colleges statewide approved by the State to conduct related and supplemental training so it could bring the classroom to the students rather than have the students go to the classroom.

First, a residency requirement that is designed to discourage people from moving into a community is not bona fide, no matter how short its duration. In *Supreme Court v. Friedman,* 487 U.S. 59, 108 S. Ct. 2260, 101 L. Ed. 2d 56 (1988) (the Supreme Court held a continuing residency requirement to "waive in" to state bar violated the Privileges and Immunities Clause); *see also, Camps Newfound/Owatonna v. Town of Harrison,* 520 U.S. 564, 117 S. Ct. 1590, 137 L. Ed. 2d 852 (1996) ("Protectionism, whether targeted at for-profit entities or serving, as here, to encourage nonprofits to keep their efforts close to home, is forbidden under the dormant Commerce Clause."). And, unlike the cases of voter eligibility or the spending of local tax money, a residency requirement on the right to apply for admission to a private educational institution has no legitimate relationship with activity that may occur after admission to the program. As stated in *Nelson v. Geringer,* 295 F.3d 1082 (10th Cir. 2002):

> [d]espite this concession, the state asserts that the residency restriction is constitutional because it is a "bona fide" residency requirement, by which the state apparently means to distinguish this continuing residency requirement from durational residency requirements that have been invalidated on right-to-travel and equal protection grounds. . . . Where continuing residency requirements also impede an activity protected by the Privileges and Immunities Clause, however, they may still be void as unconstitutional under that Clause. *See,* e.g., *Supreme Court v. Friedman,* 487 U.S. 59, 101 L. Ed. 2d 56, 108 S. Ct. 2260 (1988) (continuing residency requirement to "waive in" to state bar violates Privileges and Immunities Clause); *Supreme Court v. Piper,* 470 U.S. 274, 84 L. Ed. 2d 205, 105 S. Ct. 1272 (1985)

(continuing residency requirement for admission to state bar violates Privileges and Immunities Clause). Thus, the state's bare assertion that this residency requirement is "bona fide" does not determine whether the requirement is constitutional under the Clause that the state has conceded is at issue.

Second, the hardship of the residency requirement is not *de minimus* as compared to the relative benefit at the time it is being imposed. Residency requires both physical location and intent to remain indefinitely, *Martinez v. Bynum*, 461 U.S. 321, 331, 103 S. Ct. 1838, 75 L. Ed. 2d 879 (1982) (residence requires physical presence and intention to remain). While students attending post-secondary education often live on campus, they most generally do not become residents of their new abode because they do not intend to remain there indefinitely. And all the justifications for residency requirements offered by the State apply, if at all, to living close to school during the period of actual attendance in the ACTA program, which is not a rationale for a true "residency" but for a temporary "housing" requirement. Yet, ACTA apprentices, once indentured, may live anywhere, so that a restriction on admission cannot be rationally related to the purposes of attendance after admission.

Third, all the state's justifications do not apply to student admission, but to school attendance. But there are no residency requirements after admission to this program, and the standards provide for distance learning and on the job education statewide. For example, under the present rules a local applicant can join the program and travel anywhere while still being indentured, but a non-local resident may not join the program even if he or she is

obligated to relocate to the four county area in order to attend school. Thus, this residency requirement for admission to a private, as opposed to a public, college becomes a burden on interstate travel with no off-setting state interest. *Frazier v. Heebe*, 482 U.S. 641, 107 S. Ct. 2607, 96 L. Ed. 2d 557 (1987) (continuing residency requirement imposed by the federal district court for the Eastern District of Louisiana is unnecessary and arbitrarily discriminates against out-of-state attorneys.).

Fourth, the state should have been required to show at least a "substantial relationship" to its prohibition on recruiting and a legitimate public policy goal. In *Saenz v. Roe*, 526 U.S. 489, 119 S. Ct. 1518, 143 L. Ed. 2d 689 (1999) (*Saenz*), the Supreme Court required a "substantial reason" rather than a pure rational relationship test. An intra-state residency requirement is judged by the same criteria. *Cooperrider,* 97 Cal. App. 3d 495 (Establishing the right to commute intrastate). As this Court stated in *Saenz*, 526 U.S. at 501-502:

> Thus, by virtue of a person's state citizenship, a citizen of one State who travels in other States, intending to return home at the end of his journey is entitled to enjoy the "Privileges and Immunities of Citizens in the several States" that he visits. This provision removes "from the citizens of each State the disabilities of alienage in the other States." *Paul v. Virginia,* 75 U.S. 168, 8 Wall. 168, 180, 19 L. Ed. 357 (1869) ("Without some provision . . . removing from citizens of each State the disabilities of alienage in the other States, and giving them equality of privilege with citizens of those States, the Republic would have constituted little more than a league of States; it would not have constituted the Union which now

> exists"). It provides important protections for nonresidents who enter a State whether to obtain employment, *Hicklin v. Orbeck*, 437 U.S. 518, 57 L. Ed. 2d 397, 98 S. Ct. 2482 (1978), to procure medical services, *Doe v. Bolton*, 410 U.S. 179, 200, 35 L. Ed. 2d 201, 93 S. Ct. 739 (1973), or even to engage in commercial shrimp fishing, *Toomer v. Witsell*, 334 U.S. 385, 92 L. Ed. 1460, 68 S. Ct. 1156 (1948). Those protections are not "absolute," but the Clause "does bar discrimination against citizens of other States where there is no substantial reason for the discrimination beyond the mere fact that they are citizens of other States."

Fifth, the residency requirement does not pass muster under even a rational basis test. The order of the CAC applies a residency requirement only to the application for admission to the ACTA program, and says nothing about residency or location of the schooling after the employee is admitted to the program. This is not a public employment case because California voters amended the California constitution to forbid a residency requirement for public employment except that a charter city may require essential personnel (emergency response) to live in reasonable proximity. CAL. CONST., art. XI, § 10, subd. (b), *Cooperrider*, 97 Cal. App. 3d 495. Thus, all the justifications for residency relating to access to education are irrelevant, because the restrictions do not apply after the applicant is accepted. At oral argument, the DAS and CAC admitted that there is no similar requirement for residency during the educational process. There is no legitimate reason to extend a residency requirement to the application process alone.

Finally, a restriction on application to an out-of-area, privately funded program or school is a direct assault on the right to travel and the equal protection, which requires a heightened scrutiny analysis. *Attorney Gen. of New York v. Soto-Lopez*, 476 U.S. 898, 106 S. Ct. 2317, 90 L. Ed. 2d 899 (1986) (State's civil service veteran's preference for only those who were residents at the time they entered military service is unconstitutional.). The California Supreme Court case of *Del Monte v. Wilson*, 1 Cal. 4th 1009, 824 P.2d 632, 4 Cal. Rptr. 2d 826 (1992) (*Del Monte*) reached an identical result, holding that the restriction of state veterans' education benefits could not be restricted to persons who were California residents at the time they entered military service. Here, the state refuses to give indentured apprenticeship status or "benefits" based upon residency "at the time of application." Even though the higher strict scrutiny standards are required to justify any residency requirement, the Court in *Del Monte* stated that a residency condition was not rationally related to achieving a legitimate state purpose, and violated the federal equal protection clause. As the Court in *Del Monte* stated:

> The high court invalidated statutes that employed fixed-point residency requirements to determine eligibility for benefits, maintaining that the very purpose of these statutes to prefer or reward established residents is illegitimate. In three cases the court analyzed the matter purely as a question of equal protection; in the fourth, a divided majority of the court could not agree whether such a statute also violated the constitutional right to travel, but struck down the state statute nonetheless. We feel constrained by these decisions to declare unconstitutional the statutes challenged here.

B. THE CALIFORNIA COURTS ERRED BY NOT HOLDING THAT A STATE-MANDATED RESIDENCY RESTRICTION FOR ADMISSION TO A PRIVATE EDUCATIONAL INSTITUTION, AS OPPOSED TO A PUBLIC SCHOOL, DOES NOT VIOLATE THE FIRST AND FOURTEENTH AMENDMENTS

The state can no more ration or limit the number of **private** educational institutions that service an area than it could legislate there be only one newspaper in any geographic location. The Court of Appeal confused the fundamental right to attend a private educational institution of one's own choosing if the institution itself accepts the applicant with the right of the State to restrict "free" education to local residents. *Compare San Antonio Independent Sch. Dist. v. Rodriguez*, 411 U.S. 1, 93 S. Ct. 1278, 36 L. Ed. 2d 16 (1973) (public education) with *Wisconsin v. Yoder,* 406 U.S. 205, 92 S. Ct. 1526, 32 L. Ed. 2d 15 (1972) (state law prohibiting non-attendance violated establishment clause); *Pierce v. Society of Sisters*, 268 U.S. 510, 45 S. Ct. 571, 69 L. Ed. 1070 (1925) (*Pierce*) (state law prohibiting attendance at private school by mandating attendance at public school only violated due process); *Meyer v. Nebraska*, 262 U.S. 390, 43 S. Ct. 625, 67 L. Ed. 1042 (1923) (*Meyer*) *overruled on other grounds Abbott v. Bragdon*, 912 F. Supp. 580, 594 (D. Me., 1995) (state law prohibiting private school from teaching in a modern foreign language violated due process).

The First Amendment guarantees the right to attend any lecture or school that will accept the applicant. The Fourteenth Amendment prevents states from prohibiting attendance at nonpublic schools, and requires that all

regulation of private schools be limited to reasonable, nondiscriminatory rules designed to advance legitimate, secular interests. *Board of Education v. Allen*, 392 U.S. 236, 245-47, 88 S. Ct. 1923, 20 L. Ed. 2d 1060 (1968) ("Since *Pierce*, a substantial body of case law has confirmed the power of the State to insist that attendance at private schools, if it is to satisfy state compulsory-attendance laws, be at institutions which provide minimum hours of instruction, employ teachers of specified training, and cover prescribed subjects of instruction.") *Pierce*, 268 U.S. at 534; *Windsor Park Baptist Church v. Arkansas Activities Association*, 658 F.2d 618, 621 (8th Cir. 1981) ("The Fourteenth Amendment forbids the States to prohibit attendance at nonpublic schools, either secular or religious").

In *Pierce*, a Catholic school and a private military academy both challenged an Oregon law that mandated attendance at public schools in the district where the child resided. The Supreme Court found that "[t]he Oregon Compulsory Education Act, which with certain exemptions, requires every parent, guardian or other person having control of a child between the ages of eight and sixteen years to send him to the public school in the district where he resides, for the period during which the school is held for the current year, is an unreasonable interference with the liberty of the parents and guardians to direct the upbringing of the children, and in that respect violates the Fourteenth Amendment." 268 U.S. 510. The Court said the schools had standing to raise the due process rights of the students, stating:

> Appellees are corporations and therefore, it is said, they cannot claim for themselves the liberty which the Fourteenth Amendment guarantees.

> Accepted in the proper sense, this is true. [Citations] But they have business and property for which they claim protection. These are threatened with destruction through the unwarranted compulsion which appellants are exercising over present and prospective patrons of their schools. And this court has gone very far to protect against loss threatened by such action.

In *Meyer*, the Supreme Court invalidated a Nebraska law that stated: "No person, individually or as a teacher, shall, in any private, denominational, parochial or public school, teach any subject to any person in any language other than the English language." In sustaining the constitutional challenge brought by a teacher convicted under the law, the Court held that the teacher's "right thus to teach and the right of parents to engage him so to instruct their children" were "within the liberty of the [Fourteenth] Amendment." 262 U.S., at 400; *see also*, *Maher v. Roe*, 432 U.S. 464, 97 S. Ct. 2376, 53 L. Ed. 2d 484 (1977) (*Maher*) (discussing the difference in application of the Fourteenth Amendment between private and public education).[9] Thus, it has long been recognized that the right of a parent to guide the education of his or her children is indeed a "fundamental right" guaranteed by the Due Process Clause of the Fourteenth Amendment. *Farrington v. Tokushige*, 273 U.S. 284, 47 S. Ct. 406, 71 L. Ed. 646

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[9] As the Supreme Court stated in *Maher*, 432 U.S. at 477: " . . . we explicitly rejected the argument that *Pierce* established a right of private or parochial schools to share with public schools in state largesse," noting that "[i]t is one thing to say that a State may not prohibit the maintenance of private schools and quite another to say that such schools must, as a matter of equal protection, receive state aid."

(1927) (Right of parents to send their children to Japanese speaking school in Hawaii).[10]

Contrary to the Court of Appeal, *San Antonio Independent Sch. Dist. v. Rodriguez*, 411 U.S. 1, 93 S. Ct. 1278, 36 L. Ed. 2d 16 (1973) is not to the contrary. While "there may be a substantial reason for requiring the nonresident to pay more than the resident . . . to enroll in the state university," *Saenz v. Roe*, 526 U.S. 489, that logic does not apply to a private educational institution and certainly not to a State-mandate that the private educational institution cannot enroll non-residents at all. *Memorial Hosp. v. Maricopa County*, 415 U.S. 250, 94 S. Ct. 1076, 39 L. Ed. 2d 306 (1974) (invalidating one-year residency requirement for receipt of non-emergency medical care because no asserted justifications found compelling).

C. PRIOR RESTRAINT OF SOLICITATION OF APPLICANTS TO ATTEND SCHOOL IS UNCONSTITUTIONAL

The First Amendment to the United States Constitution declares in relevant part, "Congress shall make no law . . . abridging the freedom of speech, or of the press; . . ." Article I, section 2, of the California Constitution provides: "Every person may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of this right. A law may not restrain or abridge liberty of

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[10] Because *Farrington, Pierce,* and *Meyer* were all decided prior to *Cantwell v. Connecticut*, 310 U.S. 296, 60 S. Ct. 900, 84 L. Ed. 1213 (1940), in which the liberties guaranteed by the First Amendment were incorporated into the Due Process Clause of the Fourteenth Amendment, and thereby made directly applicable to the states, these cases do not mention the First Amendment right to teach and be taught as a species of free speech and association which is also applicable here.

speech or press." The provisions of the California Constitution are even "more definitive and inclusive than the First Amendment [of the United States Constitution]." *Jacoby v. The State Bar of California*, 19 Cal. 3d 359, 562 P.2d 1326, 138 Cal. Rptr. 77 (1977), *citing Wilson v. Superior Court*, 13 Cal. 3d 652, 658, 532 P.2d 116, 119 Cal. Rptr. 468 (1975).

The CAC decision is unconstitutionally vague, and overbroad. It orders ACTA "to cease and desist **from recruiting** or utilizing selection methods **that result** in the recruitment or enrollment of apprentices who reside outside of Merced, Stanislaus, Mariposa, and Tuolumne Countries (sic)." (Emphasis added). Literally taken, ACTA would be in violation of the order if it prints a bumper sticker that says "SUPPORT APPRENTICESHIP, JOIN ACTA" and a non-residence is thereby induced to make application to ACTA.

It is overbroad because ACTA would be in violation of the rule if an advertisement in the local paper also appeared in another county, whether or not intentional, or was read by someone in another state on the internet who then made application. In fact, it is so overbroad, ACTA cannot advertise anywhere for apprentices for fear that a non-resident may be attracted to apply to the program. This is an unconstitutionally vague prior restraint. *Broadrick v. Oklahoma*, 413 U.S. 601, 615, 93 S. Ct. 2908, 37 L. Ed. 2d 830 (1973) (If a law restricts substantially more speech than is justified, it is subject to a facial challenge.).

An order that says "don't say things that may cause" is unconstitutionally overbroad, because ACTA cannot control what occurs as a result of its advertisements for new applicants, and therefore must self-regulate more than is necessary in order to avoid violating the CAC order. "The First Amendment, as applied to the States through the

Fourteenth Amendment, protects commercial speech from unwarranted governmental regulation." *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N. Y.*, 447 U.S. 557, 100 S. Ct. 2343, 65 L. Ed. 2d 341 (1980); *see also, Virginia Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 96 S. Ct. 1817, 48 L. Ed. 2d 346 (1975). Even if the words "Applicants Must be Residents" are included in every ad, the order would subject ACTA to punishment if Applicants from other counties still applied to the program for admission. The order does not say the exact speech prohibited or require simply the posting of a notice to future applicants that the program is restricted to residents of only four counties. The order does not even say "reasonably likely" to induce non-residents to apply. The order holds ACTA accountable for the actions of others over whom it has no control. The order is too vague and over-broad to be obeyed by ACTA. *See, e.g., Lakewood v. Plain Dealer Pub. Co.*, 486 U.S. 750, 108 S. Ct. 2138, 100 L. Ed. 2d 771 (1988). Therefore, it is unconstitutional.

IV. CONCLUSION

For the reasons stated herein, Petitioners respectfully request that this Court grant the Writ of Certiorari reversing the decision of the Court of Appeal and permitting ACTA to recruit and utilize selection methods that result in the recruitment or enrollment of apprentices who reside outside of Merced, Stanislaus, Mariposa, and Tuolumne Counties and declare that state-mandated residency restrictions for admission to private sector educational programs are unconstitutional.

Respectfully submitted,

Dated: February 15, 2005

THIERMAN LAW FIRM
MARK R. THIERMAN

DEMOND CAPERS et al., Plaintiffs and Appellants, v. HENRY P. NUNN, as Chief, etc., Defendant and Respondent; SHEET METAL WORKERS' INTERNATIONAL ASSOCIATION LOCAL UNION NO. 104 et al., Interveners and Respondents. AIR CONDITIONING TRADES ASSOCIATION UNILATERAL APPRENTICESHIP PROGRAM, Plaintiff and Appellant, v. CALIFORNIA APPRENTICESHIP COUNCIL, Defendant and Respondent, SHEET METAL WORKERS' INTERNATIONAL ASSOCIATION LOCAL UNION NO. 104 et al., Real Parties in Interest and Respondents.

C043358, C043360

COURT OF APPEAL OF CALIFORNIA, THIRD APPELLATE DISTRICT

2004 Cal. App. Unpub. LEXIS 8094

September 1, 2004, Filed

NOTICE: NOT TO BE PUBLISHED IN OFFICIAL REPORTS. CALIFORNIA RULES OF COURT, RULE 977(a), PROHIBIT COURTS AND PARTIES FROM CITING OR RELYING ON OPINIONS NOT CERTIFIED FOR PUBLICATION OR ORDERED PUBLISHED, EXCEPT AS SPECIFIED BY RULE 977(B). THIS OPINION HAS NOT BEEN CERTIFIED FOR PUBLICATION OR ORDERED PUBLISHED FOR THE PURPOSES OF RULE 977.

JUDGES: DAVIS, J.; SIMS, Acting P.J., NICHOLSON, J. Concurred.

OPINION BY: DAVIS

OPINION:

This consolidated appeal involves the subject of training apprentices. It comprises another skirmish in the "turf" battle between union and nonunion-affiliated apprenticeship programs. (*See Independent Roofing Contractors v. California Apprenticeship Council* (2003) 114 Cal.App.4th 1330, review den. Apr. 14, 2004 (*Independent Roofing*).) The appellant Air Conditioning Trades Association Unilateral Apprenticeship Committee (ACTA), a nonunion-affiliated apprenticeship program, attempted to expand its geographic area without obtaining formal approval to do so. Pursuant to administrative complaints from certain unions, i.e., Sheet Metal Workers' International Association Local Union Nos. 104, 105 and 162 (Sheet Metal Workers), the California Apprenticeship Council (Council) ordered ACTA to stop recruiting or using methods that result in the recruitment or enrollment of apprentices who reside outside of the four-county area specified in ACTA's apprenticeship program standards. The trial court denied ACTA's petition for administrative mandate that sought to overturn the Council's decision. (*ACTA v. California Apprenticeship Council,* case No. 02CS01749.) ACTA has appealed that denial.

In the trial court, the ACTA case was consolidated for hearing with another case in which six prospective apprentices (the prospective apprentices) who reside outside of the four-county ACTA area attempted to enroll in the ACTA program following the administrative decision in favor of Sheet Metal Workers. (*Capers v. Nunn,* case No. 01CS01561.) In light of that decision, the Division of Apprenticeship Standards (Division) refused to allow the

prospective apprentices to enroll, and they filed an unsuccessful petition for traditional mandate. The prospective apprentices have appealed the denial of their petition.

We have consolidated the appeals of ACTA and the prospective apprentices. [1]

ACTA contends on appeal that the Sheet Metal Workers' administrative complaints were time-barred; that the Council is equitably estopped from denying ACTA's presence throughout California; and that the Division failed to provide a fair administrative hearing.

The prospective apprentices claim that the Council's decision, imposing a residency requirement on apprentice enrollment, unconstitutionally impinges upon equal protection, the privileges and immunities clause, the right to travel, the right to an education, and the right to engage in a common occupation; ACTA adds that the Council's decision deprives it of free speech rights.

We disagree with these contentions and affirm the judgments.

BACKGROUND

In 1937, Congress enacted the National Apprenticeship Act of 1937 (commonly known as the Fitzgerald Act)

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[1] From reviewing the record, it is unclear whether the interveners and respondents in case No. C043358 and the real parties in interest and respondents in case No. C043360 include Local No. 105 or 108. The October 1999 administrative complaint lists Local No. 108 (rather than Local No. 105) as a charging party. However, documents filed with the trial court variously refer to Local No. 105 or Local No. 108. The briefs on appeal uniformly refer to Local No. 105.

to encourage the establishment of modern apprenticeship programs. (29 U.S.C. § 50; *Southern Cal. Ch. of Associated Builders etc. Com. v. California Apprenticeship Council* (1992) 4 Cal.4th 422, 432 (*Southern Cal.*).) Under the Fitzgerald Act, the federal government may choose to delegate its power to approve apprenticeship programs to states that have enacted their own apprenticeship laws. (29 C.F.R. § 29.12(a) (1992); *Southern Cal., supra,* 4 Cal.4th at p. 432.) California is one such state. (*Southern Cal., supra,* 4 Cal.4th at p. 433.)

In California, apprenticeship programs are governed by the Shelley-Maloney Apprenticeship Labor Standards Act of 1939. (Lab. Code, § 3070 et seq.; *Southern Cal., supra,* 4 Cal.4th at p. 433.) As part of that act, the Department of Industrial Relations (the Department) set up the Division and the Council. (*Southern Cal., supra,* at p. 433; Lab. Code, § 3070.) The Division administers apprenticeship programs. (*Southern Cal., supra,* at p. 433, Lab. Code, § 3073.) The Council enacts regulations regarding the "standards" of apprenticeship programs, and hears appeals from Division decisions involving complaints alleging violations of those standards. (*Southern Cal., supra,* at pp. 433, 434; Lab. Code, §§ 56, 3071, 3081-3082.) An apprenticeship program's standards constitute the rules by which it operates.

The approval process for apprenticeship programs begins when a program sponsor, such as ACTA (which operates the program), submits written program standards to the Chief of the Division for approval. (*Southern Cal., supra,* 4 Cal.4th at pp. 428-429, 433-434; Cal. Code Regs., tit. 8, §§ 212, subd. (b)(13), 218; Lab. Code, § 3075,

subd. (a).)[2] The standards must contain, among other things, a statement of "the parties to whom the standards apply, the program sponsor's labor market area . . . for purposes of meeting equal employment opportunity goals in apprenticeship training and the program's geographic area of operation . . . . " (§ 212, subd. (a)(2).) " 'Geographic Area of Operation' of an apprenticeship program means the geographic area in which the program regularly operates and trains apprentices." (§ 205, subd. (n).) An apprenticeship program "may provide for local, regional or statewide coverage in its standards." (§ 218.)

State approval is not required for a sponsor to operate an apprenticeship program. But strong financial incentives exist for sponsors to obtain approval, such as a lower apprentice wage on public works projects. (*Southern Cal., supra,* 4 Cal.4th at pp. 428-429.) Nor must an individual enroll in a state-approved apprenticeship program to work in the sheet metal trade.

ACTA's standards were approved on August 6, 1993. Pursuant to those standards, ACTA's "geographic coverage" (i.e., its geographic area of operation) comprises the four counties of Merced, Stanislaus, Mariposa and Tuolumne.

For purposes of this appeal, the parties appear to agree that an apprenticeship program's geographic coverage, as set forth in its standards, specifies the residential geographic area for enrollment of its apprentices (although ACTA and the prospective apprentices argue that a residency restriction on apprentice recruitment or enrollment

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[2] Undesignated section references will be to Title 8 of the California Code of Regulations.

unconstitutionally violates several fundamental rights). This apparent agreement is based on the two regulations noted above – one, that a program's "geographic area of operation" must be set forth in the program's standards, and two, that a program may opt for "local, regional or statewide coverage in its standards" – as well as on the fact that apprentice training combines on-the-job work with classroom instruction provided by a *local* education agency (LEA). (§§ 212, subd. (a)(2), 218, 205, subds. (c), (h), (n).) Once enrolled, however, an apprentice is not necessarily restricted to working within a program's geographic area of operation.

Not long after its standards were approved in 1993, and continuing up to this litigation, ACTA sought to expand its four-county geographic area and selected and enrolled apprentices who resided outside that area, although it was never formally granted the authority to do so. The Sheet Metal Workers filed an administrative complaint with the Division in June 1997 and a second complaint in October 1999 to stop this activity. The two complaints were consolidated for hearing.

A hearing officer was appointed and, based on that hearing, the director of the Department, acting as the Administrator of Apprenticeship (the Administrator), issued a decision on certain issues in favor of Sheet Metal Workers. (§ 202, subds. (c), (d); Lab. Code, § 3081.) The Administrator ordered ACTA to stop using any apprentice selection methods not expressly set forth in its formally approved standards, and to stop recruiting or using selection methods that result in the recruitment or enrollment of apprentices who reside outside of Merced, Stanislaus, Mariposa or Tuolumne counties.

ACTA appealed the Administrator's decision to the Council. (Lab. Code, § 3082.) The Council agreed with the Administrator, and adopted the Administrator's order as its own. In the trial court, ACTA filed a petition for administrative mandate to review the Council's decision. (Code Civ. Proc., § 1094.5.)

After the Administrator issued his decision, the prospective apprentices (who did not reside in ACTA's four-county geographic area but sought to enroll in the ACTA program) filed a petition for a traditional writ of mandate in the trial court against the Chief of the Division. (Code Civ. Proc., §§ 1085, 1086.) The prospective apprentices sought to compel the Division to admit them to ACTA because their exclusion on residency grounds allegedly violated several fundamental constitutional rights.

The trial court consolidated for hearing the writ petitions of ACTA and the prospective apprentices. The trial court upheld the Council's administrative decision, and consequently denied both petitions. Two judgments were entered. We have consolidated the two appeals.

DISCUSSION

I. Timeliness of Sheet Metal Workers' Complaints

ACTA contends that the Sheet Metal Workers' administrative complaints of June 1997 and October 1999 were time-barred under section 201, subdivision (a). We disagree.

Section 201, subdivision (a), states as pertinent: "Complaints may be filed by any interested person with the Administrator . . . within the time period specified below, when there is cause to believe . . . that there has

been a violation of: [¶] . . . [¶] (3) Apprenticeship Standards, 30 days[.]"

In their complaints, the Sheet Metal Workers alleged, among other things, that ACTA (1) enrolled apprentices outside of the area of coverage stated in ACTA's approved standards; (2) abandoned the selection procedure for apprentices set forth in those standards; and (3) used LEAs (i.e., local education agencies) that were not set forth in those standards.

As we have noted, not long after its standards were approved in 1993, *and continuing up to this litigation,* ACTA sought to expand its geographic area and selected and enrolled apprentices from outside that area, although it was never formally granted the authority to do so. As the trial court correctly recognized, the fact that this was "an ongoing practice" rendered the Sheet Metal Workers' complaints timely. Those complaints did not seek redress for some past transgression. Instead, they sought to put an end to this ongoing practice.

II. Estoppel

ACTA contends the Council is equitably estopped from denying ACTA's presence throughout California based on what the Division said and did. We disagree.

Equitable estoppel may be invoked only when the party to be estopped knows the facts and intends or effectively intends that its conduct be relied upon, and the party claiming estoppel is ignorant of the facts and relies upon the conduct to its detriment. (*Hughes v. Board of Architectural Examiners* (1998) 17 Cal.4th 763, 794.) This doctrine "ordinarily will not apply against a governmental

body except in unusual instances when necessary to avoid grave injustice and when the result will not defeat a strong public policy." (*Id.* at p. 793.)

ACTA's estoppel argument fails both factually and legally.

The argument fails factually for the same reason we noted in *Independent Roofing.* ACTA "does not discuss all the evidence on which the trial court relied in rejecting the argument. This waives our plenary consideration of the factual component of this issue. (*Foreman & Clark Corp. v. Fallon* (1971) 3 Cal.3d 875, 881.)" (*Independent Roofing, supra,* 114 Cal.App.4th at p. 1337.) For example, in its briefing, ACTA points us to some rather ambiguous documents and actions on the Division's part supposedly approving ACTA's purported geographical expansion, while ignoring more definitive evidence to the contrary that the trial court cited. That more definitive evidence includes a May 29, 1996, letter from the Division to ACTA, explaining that "in order for ACTA to continue its geographic expansion outside its approved area, it is imperative that you submit revisions to standards which reflect labor market serviced." On June 7, 1996, ACTA submitted these proposed revisions to the Division, which the Division returned, by letter, as not approved on July 2, 1996. Along similar lines, ACTA knew that a 1997 proposed expansion of its geographical standards had not been approved by the Chief of the Division, as required, because the signature line for his approval remained blank. (*See* § 212 ["Apprenticeship programs shall be established by written apprenticeship standards which must be approved by the Chief" of the Division; "The standards must contain [¶] . . . [¶] (b) Provisions for: [¶] . . . [¶] (13) approval of the standards, and revisions to the standards, by the

Chief" of the Division].) Moreover, in light of this evidence, ACTA cannot claim it was ignorant of the facts so as to invoke equitable estoppel.

ACTA's estoppel argument fails legally as well, and again for a reason we noted in *Independent Roofing*. ACTA "does not provide any authority for the proposition that the conduct of a subordinate body [i.e., the Division] may estop the body empowered to review its actions [i.e., the Council] from exercising that power, or that it would be reasonable to rely on promises to that effect. This would result in the absurdity of insulating a rogue entity from review." (*Independent Roofing, supra,* 114 Cal.App.4th at p. 1338.)

III. Fair Hearing

ACTA makes several assertions that the Division failed to provide a fair administrative hearing. But nearly all of these allegations suffer from at least one of the following deficiencies: a failure to cite authority, or to cite to the record, or to present argument. As a result, ACTA has waived these claims. (*Troensegaard v. Silvercrest Industries, Inc.* (1985) 175 Cal.App.3d 218, 228, 220 Cal.Rptr. 712; *Duarte v. Chino Community Hospital* (1999) 72 Cal.App.4th 849, 856.)

Had these claims not been waived, they present next to nothing on their merits. ACTA claims it was denied full notice and a full opportunity to be heard, but the record belies this claim. ACTA complains that the initial hearing officer was not an independent, quasi-judicial officer. But the record shows that this hearing officer was a Department staff attorney with no knowledge of this case and no

ties to it. ACTA maintains that it was subjected improperly to a negative inference for failing to call a witness over which it had no control – a senior consultant with the Division, Len Viramontes, who had signed or authored some documents noting ACTA's geographic expansion; the record disputes that such an inference was drawn. ACTA contends the record does not support the Administrator's conclusion regarding the qualifications of certain LEA instructors, but ACTA prevailed on this point. Finally, ACTA complains that it never received a copy of the initial hearing officer's recommendation, but there is no such requirement. (*Bollinger v. San Diego Civil Service Com.* (1999) 71 Cal.App.4th 568, 577.) The Administrator, as happened here, may take the initial hearing officer's recommendation and render a full decision on its own, including findings of fact; then the Council reviews the Administrator's decision. (*See* § 202, subds. (c), (d); Lab. Code, § 3082.)

IV. Constitutional Claims

The prospective apprentices contend that the Council's decision and order, imposing a residency requirement for admission to ACTA's apprenticeship program, unconstitutionally impinges upon the equal protection and the privileges and immunities clauses; in this context, they invoke the right to travel, the right to an education, and the right to engage in a common occupation. ACTA adds that the Council's decision deprives it of free speech rights. We disagree.

A. The Prospective Apprentices' Equal Protection and Privileges and Immunities Claims

1. Background, Standard of Review, and Analysis of Residency Requirement Under the Rational Basis Test

The equal protection and the privileges and immunities clauses operate similarly here, and may be analyzed together under the equal protection legal framework. The clauses require that persons under like circumstances receive equal treatment and be granted equal privileges and immunities under the law. (U.S. Const., 14th Amend.; Cal. Const., art. I, § 7, subds. (a), (b); *see* 8 Witkin, Summary of Cal. Law (9th ed. 1988) Constitutional Law, § 593, p. 44.) The equal protection clause applies only to *state* action, not to private discrimination; and may be invoked in cases where *state executive officials* have acted. (*See* 8 Witkin, Summary of Cal. Law, *supra,* §§ 595, 597, pp. 45, 48.)

In equal protection cases not involving a suspect classification, such as race, or the alleged infringement of a fundamental interest or right, such as the right to vote, a classification drawn in the law is upheld if it is rationally related to a legitimate state purpose. This is known as the rational basis test. But if a suspect classification is imposed or a fundamental interest infringed, the classification is subject to strict scrutiny and is upheld only if it is necessary to further a compelling state interest. This is known as the strict scrutiny test. (*Weber v. City Council* (1973) 9 Cal.3d 950, 958-959, 109 Cal. Rptr. 553; *Ector v. City of Torrance* (1973) 10 Cal.3d 129, 134-135, 109 Cal. Rptr. 849 (*Ector*); *Graham v. Kirkwood Meadows Pub. Util. Dist.* (1994) 21 Cal.App.4th 1631, 1642 (*Graham*).)

Residency requirements divide into two camps: bona fide and durational. (*Martinez v. Bynum* (1983) 461 U.S. 321, 325-326 [75 L. Ed. 2d 879] (*Martinez*).) Bona fide residency requirements condition a benefit on actual residency within a jurisdiction, while durational residency requirements condition a benefit on a minimum period of residency within that jurisdiction. (*Ibid.*)

Bona fide residency requirements receive less scrutiny than durational ones because a bona fide requirement merely requires that a person be a resident to obtain the benefits or services restricted to residents. (*Martinez, supra,* 461 U.S. at pp. 328-329; *Ector, supra,* 10 Cal.3d at pp. 135-136.) For this reason, bona fide residency requirements are not subject to strict scrutiny but only to the rational basis test. (*Martinez, supra,* at p. 328 & fn. 7; *Ector, supra,* at pp. 134-135.)

With these principles in mind, we analyze, under the rational basis test, the four-county residency requirement for enrollment in the state-approved ACTA apprenticeship program.

An initial question may be raised about the nature of state action here. An apprenticeship program may provide for local, regional or statewide coverage in its standards. (§ 218.) It is ACTA, a private entity, and not the state, that opted for the four-county regional coverage. Assuming, however, that the Council's decision – holding that only residents of the four counties may enroll in ACTA under its current standards – constitutes state action, we proceed with the analysis.

We face here a bona fide residency requirement, not a durational one. If a prospective apprentice simply resides in one of the four subject counties, he or she is eligible to

enroll in the ACTA program. This residency requirement, then, is subject to the rational basis test.

The Council advances a number of legitimate interests regarding a residency requirement. Recall that an apprenticeship program combines on-the-job training with classroom instruction provided by an LEA. A residency requirement helps an apprentice complete the classroom portion of his or her training. If an apprentice lives too far from a program's approved LEA, he or she may find it difficult to attend classes, which are often held in the evening after a full day of work. This in turn protects apprentices from programs that may exploit them for their labor only, with no intention of providing the complete training and education that the State envisions for its registered apprentices.

Furthermore, to obtain program approval, a program sponsor must commit to helping the apprentice learn all the tools of the trade, including a commitment to use multiple employers for this purpose if necessary. (§ 212, subd. (b)(14).) The sponsor may not be able to do this if the apprentice resides outside the program's approved geographic area.

Finally, a statement of geographic area is needed to specify the area of apprentice recruitment, against which federal affirmative action guidelines or goals can be measured.

We conclude that the Council's bona fide residency requirement for ACTA apprentice enrollees, based on ACTA's geographic area of operation, is rationally related to these legitimate state interests and therefore satisfies the rational basis test. (We also note that these *multiple* state interests dispense with ACTA's argument that the

Council's *only* reason for enforcing a residency requirement for apprentice enrollment is to enforce an affirmative action program that itself is illegal under state law or not properly founded on evidence of past discrimination.)

Support for our conclusion can also be found in *Ector.* There, our state high court rejected an equal protection challenge to a bona fide residency requirement for municipal employment. (*Ector, supra,* 10 Cal.3d at pp. 134-136.) The court applied the rational basis test, rejected the strict scrutiny test, and distinguished a durational residency requirement, stating, "[t]here is no similar 'waiting period' in the provision before us, but simply a requirement of residence in the community in order to be a municipal employee." (*Id.* at pp. 135-136; *see also Graham, supra,* 21 Cal.App.4th at p. 1644 [noting a post-*Ector* law that certain public employees may now be required, at the most, to reside within a reasonable and specific distance of their place of employment, and stating that the rational basis test continues to apply to equal protection challenges of employment residency restrictions].) A bona fide residency requirement for municipal employees has certain similarities to such a requirement for apprentices.

Furthermore, the classification of counties or cities by classes according to population for various types of legislation appropriate to their distinct needs is common, and has been upheld against equal protection challenges by the United States Supreme Court. (*See* 8 Witkin, Summary of Cal. Law, *supra,* § 614, pp. 69-70.) In this context, the application of different laws to different areas is permissible; as the highest court has observed, "[t]he Equal Protection Clause relates to equality between persons as such rather than between areas." (*Salsburg v.*

Maryland (1954) 346 U.S. 545, 551 [98 L. Ed. 281]; 8 Witkin, *supra,* at pp. 69-70.)

We conclude that the Council's decision and order, imposing a bona fide residency requirement for admission to the ACTA apprenticeship program, does not violate the equal protection or the privileges and immunities clauses under the rational basis test.

2. The Strict Scrutiny Test: The Right to Travel, the Right to an Education, and the Right to Engage in a Common Occupation

The prospective apprentices claim that the strict scrutiny equal protection test applies here because the Council's residency requirement violates the right to travel, the right to an education, and the right to engage in a common occupation, all fundamental rights. We disagree.

a. The right to travel

The right to travel derives from various constitutional provisions, including the federal and state privileges and immunities clauses, but ultimately is considered simply an inherent component of a free society. (*Attorney General of N.Y. v. Soto-Lopez* (1986) 476 U.S. 898, 901-903 [90 L. Ed. 2d 899] (*Soto-Lopez*); *Independent Roofing, supra,* 114 Cal.App.4th at p. 1341.)

"A state law implicates the right to travel when it actually deters such travel, [citation] when impeding travel is its primary objective, [citation] or when it uses 'any classification which serves to penalize the exercise of

that right.'" (*Soto-Lopez, supra,* 476 U.S. at p. 903.) "The right to move within a state has [only] been declared in cases invalidating durational residency requirements." (8 Witkin, Summary of Cal. Law, *supra,* § 637, p. 90; *see also Ector, supra,* 10 Cal.3d at p. 135; *Martinez, supra,* 461 U.S. at pp. 328-329.)

The right to travel is not implicated by the Council's residency requirement for the enrollment of ACTA apprentices. This requirement, which is a bona fide residency requirement, does not prevent prospective apprentices from traveling to and residing in a county in which ACTA offers its program. The requirement does not deter or impede such travel, or create any classification which penalizes the exercise of the right to travel. If anything, the requirement *encourages* prospective apprentices to move to the counties in which the ACTA program is offered. (*See Martinez, supra,* 461 U.S. at pp. 328-329.) As in *Ector,* here the prospective apprentices' right to travel claim, "[v]iewed realistically," is a right to travel between their homes and their places of apprentice employment and training. But as *Ector* recognized, there is no constitutional "'right to commute.'" (10 Cal.3d at p. 135.)

b. The right to an education

California recognizes a constitutional right to a public education that must be furnished to all students equally. (*Butt v. State of California* (1992) 4 Cal.4th 668, 680-681.) However, that right has not been extended to the post-secondary, private education realm, in which the ACTA apprenticeship program falls. (*Gurfinkel v. Los Angeles Community College Dist.* (1981) 121 Cal.App.3d 1, 5-6; *Independent Roofing, supra,* 114 Cal.App.4th at p. 1342.)

The prospective apprentices claim there is a fundamental right to attend a *private* educational institution of one's choosing if the institution itself accepts the applicant. To the extent this is true, there is nothing in the Council's recognition of an enrollment residency requirement for ACTA apprentices – a recognition that is necessary to maintain state approval of the ACTA program under ACTA's current standards – that legally forecloses nonresidents from becoming apprentices with ACTA. The nonresident apprentices could not be state-registered and the ACTA program could not be state-approved (and significant economic benefits would thereby be lost), but nothing *legally* prohibits nonresidents from attending the ACTA program if they so choose and ACTA accepts them. (*See Southern Cal., supra,* 4 Cal.4th at pp. 428-429 [neither federal nor state approval is required for a sponsor to operate an apprenticeship program, but nonapproved programs are excluded from certain advantages].)

c. The right to engage in a common occupation

The prospective apprentices claim they have a right to engage in a common occupation as a fundamental right centered in the liberty component of the due process clause.

However, the right to engage in a particular occupation is not a substantive fundamental right and thus does not warrant strict scrutiny. (*Warden v. State Bar* (1999) 21 Cal.4th 628, 641-643; *Independent Roofing, supra,* 114 Cal.App.4th at p. 1341.) As we said in *Independent Roofing,* "to the extent that due process entitles individuals to engage in a chosen field of employment, it is nonetheless

subject to reasonable regulation short of complete prohibition. (*Conn v. Gabbert* (1999) 526 U.S. 286, 291-292.)" (*Independent Roofing, supra,* 114 Cal.App.4th at p. 1342, italics omitted.) Previously, we discussed how the Council's bona fide residency requirement for ACTA enrollment is rationally related to the legitimate state interests of implementing the classroom portion of apprentice training, minimizing the exploitation of apprentice labor, maximizing employer commitment, and ensuring compliance with federal affirmative action guidelines. This constitutes reasonable regulation.

Moreover, the bona fide residency requirement here does not prohibit the prospective apprentices from being trained as apprentices and working in the sheet metal trade. The residency requirement does not deter or impede the prospective apprentices from moving to a county in which ACTA offers its program, or from enrolling in a program in the county where they currently reside. (*Independent Roofing, supra,* 114 Cal.App.4th at p. 1341, fn. 6; *See* Lab. Code, § 3075, subd. (a).) Moreover, there is no requirement that an individual enroll in a state-approved apprenticeship program to work in the sheet metal trade. Thus, the "right to engage in a common occupation" argument fails.

Although it does not appear ACTA has done so, to the extent that ACTA itself contends its right to travel, right to an education, or right to engage in an occupation were somehow violated, we reject those contentions for the reasons explained in *Independent Roofing.* (*Independent Roofing, supra,* 114 Cal.App.4th at pp. 1341-1342.)

B. ACTA's Free Speech Claim

ACTA casts its gaze on another fundamental right – free speech. It argues that the Council's order acts as a prior restraint on the lawful solicitation of apprentices and is unconstitutionally vague and overbroad. We disagree.

ACTA points to that part of the Council's order directing ACTA to "cease and desist *from recruiting* or utilizing selection methods that result in the recruitment or enrollment of apprentices who reside outside of Merced, Stanislaus, Mariposa and Tuolumne Count[ ]ies." (Italics added by ACTA.) ACTA argues that this order is so overbroad, ACTA "cannot advertise anywhere for apprentices for fear that a nonresident may be attracted to apply to the program." It is ACTA's argument that is overbroad; in fact, it goes overboard.

Under the challenged part of the Council's order, ACTA is prohibited from "recruiting . . . *apprentices* who reside outside of" the four-county area specified in ACTA's standards. (Italics added.) If a nonresident *applicant* applies to the ACTA program, ACTA can simply inform the applicant that its apprenticeship program is limited to residents of Merced, Stanislaus, Mariposa and Tuolumne Counties. Within the limits of relevant laws (e.g., false advertising, commercial speech), ACTA is free to say whatever it wants regarding its program, wherever it wants. There is no vague, overbroad prior restraint of speech at work here.

We reject the constitutional claims of the prospective apprentices and ACTA.

We do note that the Council and Department have allowed nonresident apprentices currently enrolled in the ACTA program to complete the program and be registered.

We also note our previous denial of the judicial notice request from ACTA and the prospective apprentices. We grant Sheet Metal Workers' motion to strike portions of the reply brief to the extent the brief cites items not in the record or already foreclosed by our judicial notice ruling.

DISPOSITION

The judgments are affirmed. Each parties shall pay its own costs on appeal.

DAVIS, J.

We concur:

SIMS, Acting P.J.

NICHOLSON, J.

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Chief of Division of Apprenticeship Standards

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SACRAMENTO

DEMOND CAPERS, DUANE TREVETHEN, DIANE NESS, ERIC KENDALL, JENNIFER BATTS and JUSTIN GARCIA, Petitioners, v. HENRY P. NUNN, *in his official capacity,* Respondent. SHEET METAL WORKERS' INTERNATIONAL ASSOCIATION LOCAL NOS. 104, 105 & 162, Intervenors.	Case No. 01 CS01561 **JUDGMENT IN CAPERS ET AL. V. NUNN,** **CASE NO. 01 CS01561** (Filed Jan. 28, 2003) Case No. 02 CS01749

CONSOLIDATED WITH

AIR CONDITIONING TRADES ASSOCIATION UNILATERAL APPRENTICESHIP COMMITTEE,

Petitioner,

v.

CALIFORNIA APPRENTICESHIP COUNCIL,

Respondent,

SHEET METAL WORKERS' INTERNATIONAL ASSOCIATION LOCAL NOS. 104, 105 & 162,

Real Parties in Interest.

The Petition for Peremptory Writ of Mandate, Prohibition and/or Other Appropriate Relief in *Capers et al. v. Nunn,* Sacramento Superior Court Case No. 01 CS 01561, came duly on for hearing on the merits on Friday, January 10, 2003 at 1:30 p.m. in Dept. 33 of this court, the Honorable Lloyd G. Connelly, judge presiding. The *Capers* petitioners were represented by Mark Thierman; Fred Lansdale and Carol Belcher appeared for respondent Nunn; Mark Renner appeared on behalf of the intervenors Sheet Metal Workers' International Association Local Nos. 104, 105 & 162; and, Scott Kronland and Victor Ortiz-de-Montellano appeared on behalf of intervenor Sheet Metal Workers' International Association Local No. 104.

The Court, having reviewed the papers submitted by counsel and considered the oral arguments at hearing, denies the petition on the merits, for the reasons set forth

in the Court's ruling from the bench at hearing and as otherwise appears from the record.

THEREFOR, judgment is accordingly hereby entered in favor of respondent Nunn and against petitioners Demond Capers, Duane Trevethen, Diane Ness, Eric Kendall, Jennifer Batts, and Justin Garcia.

SO ORDERED.

Respondents are to recover costs pursuant to Government Code §6103.5. When the amount equal to the amount owed to the clerk is collected, said amount is due and payable to the court.

DATED: Jan 28, 2003

/s/ Lloyd G. Connelly
Hon. Lloyd G. Connelly
JUDGE OF THE
SUPERIOR COURT

Approved as to form:

Mark R. Thierman
Mark R. Thierman, Esq.
Counsel for the *Capers* petitioners

Dated: _____

Approved as to form:

/s/ Mark Renner
Mark Renner, Esq.
Counsel for intervenors
Sheet Metal Workers'
International Association
Local Nos. 104, 105 & 162

Dated: 1-16-03

Approved as to form:

_____ Dated: _____
Scott Kronland, Esq./Victor Ortiz-de-Montellano, Esq.
Counsel for intervenors Sheet Metal Workers'
International Association Local No. 104

Superior Court of California
County of Sacramento

[SEAL]

PHCC OF THE GREATER SACRAMENTO AREA AND PHCC OF THE GREATER SACRAMENTO AREA PLUMBERS UNILATERAL APPRENTICESHIP COMMITTEE,
Petitioner,

V.

CALIFORNIA APPRENTICESHIP COUNCIL,
Respondent.
/

FRESNO AREA PLUMBERS, PIPE AND REFRIGERATION FITTERS JATC,

Real Party in Interest
/

INDEPENDENT ROOFING CONTRACTORS OF CALIFORNIA UNILATERAL APPRENTICESHIP COMMITTEE, an employee benefit plan operating a state Approved apprenticeship training program,
Petitioner,

V.

CALIFORNIA APPRENTICESHIP COUNCIL, and its Members, MAX TURCHEN, CAROLE CRESCI COLBERT And BRAD PLUEGER, in their official capacity,
Respondents,

NO. 01CS01172

COURT'S RULING ON SUBMITTED MATTER

and

10 BAY AREA COUNTIES AND SOUTHERN CALIFORNIA ROOFERS AND WATERPROOFER'S [sic] JOINT APPRENTICESHIP TRAINING COMMITTEE,

Real Party in Interest /

I. Introduction and Factual Background

In this consolidated matter, petitioners PHCC of the Greater Sacramento Area ("PHCC") and Independent Roofing Contractors of California ("JRCC"), the sponsors of two unilateral apprenticeship programs, seek writs of mandate under Code of Civil Procedure section 1094.5 to overturn decisions of respondent California Apprenticeship Council ("CAC"). CAC's decisions invalidated approvals these programs previously had received from the Chief of the Division of Apprenticeship Standards ("Chief DAS") allowing petitioners to expand their programs into new geographical areas. For the reasons stated below, the Court finds that the decisions of respondent CAC were legally correct and were not invalid on any of the many grounds argued in the petitions. The Court accordingly denies the petitions.

This case involves two separate administrative proceedings that share many common legal and factual issues.[1] The petitioners are so-called "unilateral" apprenticeship committees, that is, organizations that have been established by non-union employers in the building trades

[1] The Court has somewhat simplified the factual and procedural background of this matter for the sake of brevity and clarity.

to train and employ apprentice workers. Apprenticeship programs are extensively regulated by federal and state law. Federal law sets the framework; within that framework, California has enacted apprenticeship laws in compliance with federal standards and thus has been delegated power under federal law to administer apprenticeship training programs. California law regulating such programs is found in Sections 3070, et seq. of the Labor Code and in Title 8 of the California Code of Regulations, sections 200, et seq.

The designated regulatory authority governing apprenticeship programs in California is respondent CAC, which has the power to, among other things, issue rules and regulations governing the standards for such programs, including the provisions of Title 8 referred to above.[2] Day-to-day administration of the apprenticeship laws pursuant to such regulations is carried out by the Chief DAS, an office within the Department of Industrial Relations.[3] Among the powers of the Chief DAS established by regulation is the power to approve written standards for apprenticeship programs.[4] That approval power is subject to appeal to the CAC, and is the source of the dispute here.[5]

Both of the petitions involved in this consolidated matter arose out of disputes over the desire of the respective petitioners to expand their programs into new geographical areas. As background, in December 1993, the

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[2] Labor Code section 3070, 3071.

[3] Labor Code section 3073.

[4] Title 8, California Code of Regulations, section 212.

[5] Title 8, California Code of Regulations, section 212.2(j).

Chief DAS approved written standards for a plumber's apprenticeship program operated by PHCC. Those written standards ("the 1993 Standards"), which are not challenged here, stated that the program was intended to operate in Sacramento County. In December 1997, PHCC asked the Chief DAS to approve written standards for a plumbing apprenticeship program covering the entire state of California ("the 1997 Standards"). The Chief DAS approved the standards in January 1998.

Similarly, prior to August 27, 1998, IRCC operated an apprenticeship training program under written standards covering fifteen Northern California counties. In August and December 1998, the Chief DAS approved written standards expanding IRCC's program to a total of nine additional counties.

In both cases, the Chief DAS granted approval for the expanded area of operations without complying with Regulation 212.2. The regulation requires the Chief DAS to give notice of the proposed standards of a program to existing programs in the area in which the proposed program will operate. The existing program is provided an opportunity to comment on the expansion, to participate in any bearing on the expansion, and to appeal the decision of the Chief DAS to respondent CAC.

In approving petitioners' expanded standards without giving such notice, the Chief DAS evidently took the position that compliance with the regulation was not necessary because the regulation only applied to requests for approval of "new" programs and that the two petitioners were merely seeking approval of "revisions" to existing

programs. Both petitioners operated their apprenticeship training programs in the expanded areas.[6]

Petitioners' expanded operations were discovered by two so-called Joint Apprenticeship Training Committees ("JATCs"), namely, the two real parties in interest in this proceeding, the Fresno Area Plumbers, Pipe and Refrigeration Fitters IATC (in the PHCC matter) and the 10 Bay Area Counties and Southern California Roofers and Waterproofers IATC (in the IRCC matter). JATCs are, as their names imply, apprenticeship training programs jointly run by unionized employers and labor unions in the building trades. According to the petitioners here, such programs are philosophically and in other respects antagonistic to unilateral programs such as those operated by petitioners. In this case, the two IATCs filed complaints with the Administrator of Apprenticeship of the State of California claiming that petitioners were operating in violation of their originally-approved standards and charging that the Chief DAS had improperly approved petitioners' expansion into new areas.

The two matters were assigned to two independent hearing officers who rendered separate decisions ("the Administrator's Decisions"). In the PHCC matter, the Administrator's Decision found that petitioner had been operating in violation

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[6] The Court is aware of the contention, made below and found to be true in the Administrator's Decision in the PHCC matter, that PHCC operated its program outside the original geographical area even before the Chief DAS granted approval of the expanded areas of operations. That contention is essentially subsumed into the ultimate finding of the CAC, discussed below, that the Chief DAS improperly granted approval without complying with the procedural requirements of the applicable regulation. Accordingly, the Court will not further address such contention.

of the 1993 Standards by, in effect, running a new program as a result of its geographical expansion beyond Sacramento County and in other respects. The Administrator's Decision ordered PHCC to comply with the 1993 Standards and to cease operations outside Sacramento County. In the IRCC matter, the Administrator's Decision found that the JATC's challenge to MCC's operation of its program prior to the Chief DAS' approval of expansion in August and December 1998 was time-barred. Both Administrator's Decisions found that the issue of whether the Chief DAS had improperly granted approval of the petitioners' expanded areas of operation was a matter that properly should be referred to respondent CAC.

The two matters then proceeded to hearing before respondent CAC, in part on the issues referred to it by the Administrators' Decisions, and in part on appeal from the rulings in those decisions by the various parties. The result was the CAC decisions that are the subject of these writ proceedings. In both matters, respondent CAC ruled that the Chief DAS should have complied with Regulation 212.2 by giving notice to existing programs (such as the two JATCs) before approving the geographical expansions of the petitioners' programs. Since the Chief DAS did not comply with the regulation, respondent CAC found the approvals to be invalid and overturned them. Respondent CAC further ruled that both petitioners were authorized to operate their programs only under the original standards. These rulings are the subject of the current petitions.[7]

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[7] Respondent CAC further ruled in the PHCC matter that, although the expansion of PHCC's program was invalid, individual apprentices who had enrolled in the program outside Sacramento County should be permitted to continue in the program until the end of

(Continued on following page)

Petitioners challenge the decisions of respondent CAC on a host of grounds.[8] Perhaps foremost among the issues raised, and one that is common to both petitioners, is the contention that the geographical expansion of their programs does not come within the scope of Regulation 212.2. Petitioners contend that Regulation 212.2 applies only to new programs, and not to expansions of existing programs, which are properly characterized as "revisions". They further argue that the Chief DAS has always treated geographical expansions in this manner. Accordingly, petitioners contend that respondent CAC improperly interpreted and applied the regulation, and, alternatively, that it was estopped from deciding the matter against petitioners because of the earlier actions and policy of the Chief DAS in approving the expansions.

Beyond this common contention in both petitions, both petitioners also challenge respondent CAC's actions as being beyond its jurisdiction, as violating various constitutional rights, and as being rendered by an unfair and biased decision-maker.

The Court will begin by analyzing whether the expansion of petitioners' programs triggered the provisions of Regulation 212.2 (in other words, whether respondent's

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their training. That ruling is the subject of a cross-petition for writ of mandate by real party in interest Fresno JATC. Fresno JATC has deferred a hearing on the claims raised by its cross-petition pending the decision on the petitioner's claims: Accordingly, the cross-petition will not be discussed further in this Ruling.

[8] There is a substantial overlap in the issues raised by the two petitioners. Where appropriate, the Court will analyze issues common to both petitioners under a single heading. Where factual and legal issues diverge, the claims of the two petitioners will be treated separately.

decisions correctly applied the regulation) and will then will [sic] discuss each of the petitioners' other arguments.

II. Respondent CAC Correctly Applied Regulation 212.2

Respondent CAC found that the geographical expansion of both petitioners' programs required compliance with the terms of Regulation 212.2. Because those procedures had not been followed, respondent overturned the approval by Chief DAS of PHCC's 1997 Standards and IRCC's 1998 expansions and ruled that both petitioners were authorized to operate only under their earlier approved standards.[9]

The Court finds that respondent's decisions correctly interpreted and applied Regulation 212.2. Regardless of whether the expansion of petitioners' programs into new geographical areas may be characterized as "new programs" or as "revisions" of existing programs, Regulation 212.2 required the Chief DAS to follow certain procedures before approving the expansion. Those procedures were not followed here, rendering the Chief's approval invalid.

Although the regulations governing apprenticeship training programs were amended during the time at issue in this case, at all relevant times they required the written standards for such programs to contain a statement of the geographical area in which the program would operate. At the time PHCC's 1993 Standards were approved, Regulation 212(b)(2) required program standards to include a statement of the "party or parties to whom the standards

[9] Decisions of the California Apprenticeship Council (PHCC matter), p. 3:1-4; (IRCC matter), p. 3:14-17.

apply and the geographic area".[10] Pursuant to this regulation, PHCC's 1993 Standards defined the area covered by the standards as "Sacramento County, California."[11] In 1997, Regulation 212(b)(2) was amended to require the program standards to contain a statement of "the parties to whom the standards apply and the program sponsor's labor market area, as defined by Section 215 appendix 2(I), for purposes of meeting equal employment opportunity goals in apprenticeship training".[12] Accordingly, on December 16, 1997, petitioner sought approval of standards covering "all counties in California."[13] The 1997 Standards thus represented an expansion of petitioner's program into geographical areas not included in the 1993 Standards.

Similarly, prior to 1998, IRCC had obtained the approval of Chief DAS to operate in fifteen named counties in Northern California.[14] In 1998, IRCC sought approval

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[10] Title 8, California Code of Regulations, section 212(b)(2), as operative May 22, 1992.

[11] Extract of New Standards dated December 13, 1993, Item 2. (See also, Apprenticeship Standards, page 1, Article III.)

[12] Title 8, California Code of Regulations, section 212(b)(2), as operative June 20, 1997 and thereafter.

[13] Extract of New Standards dated December 16, 1997, Item 2. (See also, Unilateral Apprenticeship Standards, page 1, Article III.)

[14] See, Apprenticeship Standards of the Independent Roofing Contractors of California, Inc. Unilateral Apprenticeship Committee, approval dated May 22, 1991 (covering 10 counties); Decision of the Chief DAS approving expansion of the program to Santa Clara County dated August 21, 1992; and Revision of Approved Standards, approval dated October 19, 1993 (covering four additional counties.)

on two separate occasions to expand its operations to new geographical areas in a total of nine additional counties.[15]

By its terms, Regulation 212.2 applies to a request by the operator of an apprenticeship training program for the approval of the "proposed standards of a program". The regulation establishes a detailed process in which the operators of existing programs are entitled to notice, an opportunity to comment, and even an opportunity to appeal when another program intends to operate in their geographical area.

Specifically, upon receipt of "the proposed standards of a program", the Chief DAS is required to serve a copy of the proposed standards on the sponsor of "each existing program in the apprenticeable occupation in the labor market area of the program. . . ." Each such existing program is permitted to submit comments on the proposed program within 30 days of receipt of the standards, and the Chief DAS may consult with such existing programs concerning the proposed program.[16] Thereafter, the Chief DAS may hold a hearing "on any issue relating to the compliance of a proposed program with federal and state law and regulations." Any party entitled to submit comments under the regulation is also entitled to notice of such hearing and the opportunity to attend it.[17] The Chief DAS is required to issue a written decision on the application, and to serve the decision on each party that submitted

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[15] IRCC Administrative Record, pp. 081-106 (approval dated August 27, 1998); and pp. 107-121 (approval dated December 4, 1998).

[16] Title 8, California Code of Regulations, section 212.2(f).

[17] Title 8, California Code of Regulations, section 212.2(g).

comments on the proposed program.[18] An existing program that submitted comments under the regulation may appeal the decision of the Chief DAS to respondent CAC (as was done here by the real parties in interest once they learned of petitioners' expanded programs).[19]

The requests of both petitioners for approval of expanded areas of operation fell squarely within the cited terms of Regulation 212.2. By expanding their operations into new counties, petitioners sought to operate their programs in areas that had not been included in their earlier approved Standards and in which there were existing programs, including the programs operated by real parties in interest. These expansions by themselves triggered the procedural requirements of the regulation. The regulation itself makes no distinction between "new" or "revised" programs, speaking only in general terms of the "proposed standards of a program." The expanded standards of both petitioners, whether technically "new" or "revised", were in either case "proposed standards of a program". Because those standards involved expanding operations into new geographical areas in which there were existing programs, the procedural requirements of Regulation 212.2 became applicable.[20] Whether petitioners'

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[18] Title 8, California Code of Regulations, section 212.2(h).

[19] Title 8, California Code of Regulations, section 212.2(j).

[20] Petitioner PHCC also argues that respondent improperly found that the addition of new sources of Related and Supplemental Instruction for apprentices made the expanded operations "new program", because these new sources of instruction were simply a consequence of the territorial expansion. Since the court has found that the territorial expansion of PHCC's program by itself triggered the procedural provisions of Regulation 212.2, it follows that the addition of new sources of instruction in the expanded areas would not change that result.

geographically expanded programs may be characterized as "new" programs or simply as "revised" programs is not a relevant distinction under the regulation.[21]

Petitioners' interpretation of the regulation, under which the notice/comment/hearing procedure would not apply to existing programs intending to expand into new areas, is an unreasonable one. It is not in harmony with the language of the regulation itself, which does not distinguish between existing and new programs. It would result in the regulation being a nullity in many situations

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[21] Petitioner PHCC also argues that respondent CAC's finding that petitioner PHCC recruited apprentices outside Sacramento County under a different name is a form of improper "double jeopardy". The Court is not persuaded by this contention. The finding is supported by evidence in the record, and is not really disputed by petitioner, which claims merely that it was "unaware" of activities of its agents and corrected the matter immediately after learning of such activity. Respondent imposed no additional sanction against PHCC based on this finding, which was in reality a part of the finding that PHCC was operating outside the geographical area stated in the 1993 Standards without proper approval by the Chief DAS. The Court accordingly finds no basis to invalidate respondent's decision on this ground. Similarly, petitioner IRCC argues that respondent CAC violated its right to due process by making a finding regarding recruitment of apprentices without any supporting evidence in the record. The Court finds no violation of due process. The language in respondent's decision of which IRCC complains is the following: "The Director did not make a finding about whether IRCC had recruited apprentices outside its original operating area. The Council assumes IRCC has done so." (Administrator's Decision, p. 2:16-17) Even if this language can be characterized as a "finding", it was not necessary to the decision and was not the basis of the decision. As was the case with the PHCC matter, respondent CAC found that the Chief DAS had not complied with Regulation 212.2 in approving the expansion of IRCC's program. Approval was overturned for failure to comply with the regulation, and not on the basis of any recruitment that may have taken place outside IRCC's original operating area. The Court views the language as mere surplusage that provides no ground for invalidating the decision.

in which it would otherwise be applicable, such as the one presented here. Moreover, petitioners' interpretation would frustrate the purposes of the regulation. Those purposes, as relevant to this case, appear to be twofold: promoting careful consideration of proposed programs by the Chief DAS (including geographical expansion of existing programs); and insuring that such programs comply with all the requirements of state and federal law. These purposes are furthered by giving existing programs a right to notice, comment and appeal when a program is proposed to begin operations in their area. This is equally true whether the applicant is a new program setting up operations in an area with an existing program an existing program expanding into that area. Petitioners' interpretation of the regulation would frustrate these purposes by effectively repealing the notice/comment/appeal procedure when an existing program seeks to expand into a new area.

In making this ruling, the Court is aware that respondent has proposed an amendment to Regulation 212.2. The amendment, which has not yet taken effect, would address "uncertainty about the circumstances in which a program's standards may be revised to change the geographical recruitment area" by providing, *inter alia*, "that the revision of a program's standards to expand the geographical recruitment area is subject to the same procedural requirements as an application for approval of a new program [and] that a notice [of] application for approval of a new program or the revision of the standards

of an existing program must be served on all existing programs in the same area."[22]

Petitioners contend that because respondent has proposed this amendment, Regulation 212.2 as it currently stands does *not* apply to geographical expansions of existing programs. The Court does not agree. As discussed above, although it is not a paragon of clarity, Regulation 212.2 is found to cover such situations. The Court thus views the amendment to the regulation as a clarification of existing law, rather than a proposed new law.

The Court also rejects the contention that respondent's interpretation and application of Regulation 212.2, and hence the two decisions under review here, constituted an illegal "underground regulation" that was not promulgated is compliance with the Administrative Procedure Act. Respondent's decisions interpreted the existing regulation and applied it to these particular cases. Those decisions were thus quasi-judicial adjudications not subject to the APA. See, *Tidewater Marine Western, Inc. v. Bradshaw* (1994) 14 Cal. 4th 557, 571.

III. Respondent CAC did not Divest itself of Jurisdiction over this Matter

Petitioner PHCC next argues that, even if respondent's application of Regulation 212.2 was correct, the decision was beyond respondent's jurisdiction. The basis of this argument is the contention that approval of PHCC's 1993 Standards delegated or vested the approval power

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[22] California Apprenticeship Council Final Statement of Reasons for Proposed and Amended Regulations, including Regulation 212.2 (Brackets added.)

over any changes to those standards solely in the Chief DAS, and that respondent CAC thereby divested itself of jurisdiction over any challenge to changed standards, such as that which occurred in this case.

The Court finds this contention to be unpersuasive. The jurisdiction of respondent CAC over apprenticeship programs in general, and over the approval of proposed standards for such programs in particular, is established by statute and regulation. Among other things, respondent CAC's power to hear and decide appeals by parties such as the real parties in interest in this case from decisions of the Chief DAS is clearly set forth in Regulation 212.2(j). No statutory or regulatory authority is offered to demonstrate that CAC lacked the power to decide this matter.

Instead, the only evidence offered to support petitioner's contention is a statement in the 1993 Standards that PHCC has the responsibility to "adopt changes to these standards, as necessary, subject to the approval of the parties hereto and the Chief of the Division of Apprenticeship Standards."[23] This language does not support a finding that respondent CAC divested itself of the jurisdiction conferred on it by statute and regulation.

First, the language does not state or imply any such divestiture. It merely states what the regulations already provide: that petitioner may change the standards subject to approval by the Chief DAS. Nothing is said regarding CAC's power to review the decision of the Chief DAS. An

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[23] Apprenticeship Standards of the PHCC of the Greater Sacramento Area Plumbers Unilateral Apprenticeship Committee, Article VI, item 9.

agreement to change the regulatory scheme cannot be implied from silence.

Second, even if such an agreement could be implied on such flimsy grounds, it would not be effective. The Chief DAS is subordinate to respondent CAC under the regulation, as is apparent from the fact that respondent is given the power to review the decisions of the Chief DAS on appeal. Powers conferred on public agencies and officers which involve the exercise of judgment or discretion, as this appeal power does, are in the nature of public trusts and cannot be surrendered or delegated to subordinates in the absence of statutory authorization. *California School Employees Association v. Personnel Commission* (1970) 3 Cal. 3d 139, 144. In this case, the statutes authorize the Chief DAS to make the "first call" on program standards, but, also by statute, the "last call" remains with respondent CAC.

Accordingly, the Court finds that, pursuant to statute and regulation, respondent CAC at all times has been vested with jurisdiction to make the two decisions challenged here.

IV. Respondent is not Estopped to Enforce the Procedural Requirements of Regulation 212.2

Petitioners further argue that respondent CAC is estopped from enforcing the procedural requirements of Regulation 212.2 based on the conduct of the Chief DAS in approving their expanded areas of operations. The alleged factual basis of this contention is that the Chief DAS had a consistent policy of treating requests for expanded areas of operations as revisions to existing programs that did not require notice to existing programs in the intended areas

of operations, and this policy should be imputed to respondent CAC. Petitioners allege that they did not know that the regulation might be applied to their requests and that they relied in good faith on the advice and counsel of employees of the Chief DAS in submitting their requests as revisions rather than new standards. Finally, petitioners allege that they have been prejudiced by the actions of the Chief DAS in that it would now be impossible for them to obtain permission to expand their areas of operation due to changes in applicable law.

The Court finds petitioners' estoppel argument to be unpersuasive for a number of reasons.

First, the evidence does not demonstrate that the Chief DAS in fact had a consistent policy of processing requests for expanded areas of operations without giving notice to existing programs under Regulation 212.2. To be sure, petitioners have presented testimony by an employee of the Chief DAS and by the Acting Chief DAS who approved PHCC's 1997 Standards[24] to the effect that geographical expansions were "always" processed without notice to existing programs. That evidence was contradicted, however, by the testimony of another DAS employee[25], who stated that he consistently gave notice under the regulation when an existing program proposed to expand into an area with an ongoing program (unless the expansion was a minor one).

Petitioners' contention is also contradicted by documentary evidence in the record showing that other programs

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[24] Leonard Viramontes and Rita Tsuda, respectively.

[25] Michael Mortell.

received approval to expand on other occasions only after compliance with the regulation.[26] Finally, petitioners' contention is belied by the fact that PHCC's request for expansion was rejected twice when submitted on the DAS form used for revisions to *existing* programs, and that it was approved only after being submitted on the form used for approval of *new* standards, and then only after a new Acting Chief DAS had taken over.[27]

As further evidence in support of their contention, petitioners also cite a 1993 Memorandum prepared by Gail W. Jesswein, then the Chief DAS, entitled "Enforcement Policy". The Court has reviewed this Memorandum and finds that it does not support petitioners' contention. The particular language upon which petitioners rely is the following: "Therefore, in existing Standards, a statement of geographic area for recruitment, and within which [Related and Supplemental Instruction] classroom training occurs, should be updated when the area of those activities expands."[28] This sentence says nothing one way or the other about whether notice of such expansion should be given under Regulation 212.2. In the Court's view, however, it is entirely consistent with the concept of giving such notice. There is no other language in the Memorandum that evidences an intent not to apply the

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[26] For example, in 1992 the request of petitioner IRCC to expand its program to Santa Clara County was approved only after the Chief DAS, then Gail Jesswein, gave notice to and received comments from the existing joint program in the area. See, IRCC Administrative Record, p. 135.

[27] Although even then, the new Acting Chief did not comply with the procedural requirements of the regulation that none of the parties deny would apply to new programs.

[28] Jesswein Memorandum dated July 14, 1993, p. 5.

regulation to geographical expansions. In fact, elsewhere the Memorandum states without qualification: "The portion of 8 C.C.R. § 212.2 regarding consultation with existing programs and notification of approvals by the Chief will be followed."[29] The Memorandum does not establish any policy of the type petitioners suggest.

Under these facts, the Court does not find that the Chief DAS had a consistent policy of treating area expansions as outside the scope of Regulation 212.2. At most, the evidence suggests a degree of confusion or uncertainty within the office of the Chief DAS as to when the regulation should apply.[30] Alternatively, the evidence may suggest that different individuals within the office of the Chief DAS were intentionally working at cross-purposes. Or it may suggest that in these particular cases, the (Acting) Chief DAS made an error. In any use, the evidence is not, in the Court's view, sufficient to estop respondent CAC from enforcing the procedural requirements of the regulation as it was otherwise entitled to do.

Second, even if some individuals within the office of the Chief DAS treated area expansions in the manner petitioners allege, that would not be sufficient by itself to estop respondent CAC from enforcing the regulation. Even assuming that petitioners relied in good faith on the advice given to them by the particular DAS employees who processed their request, or on the approval of the Acting

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[29] Jesswein Memorandum dated July 14, 1993, p. 1.

[30] This appears to be the issue referred to in the Final Statement of Reasons for the amendment to Regulation 212.2: "The primary problem addressed ... is uncertainty about the circumstances in which a program's standards may be revised to change the geographical recruitment area."

Chief, the actions of those individuals could not bind respondent CAC.

As noted above, respondent CAC stands in the position of a reviewing agency *vis-a-vis* the Chief DAS in these matters. This review power exists in order to permit respondent CAC to correct the errors of the Chief DAS. It is always entitled to exercise this power, regardless of the actions of its subordinate agency. To find that the subordinate agency could bind or estop a reviewing agency by its conduct would be to leave error uncorrected, and violations of law unremedied. It would, in fact, be to destroy the power of review established by law, a result obviously against public policy.

Third, even if estoppel were otherwise available and the other elements had been established, which is not the case here, petitioners would not be entitled to rely on the actions of the Chief DAS alone. The power of respondent CAC to hear appeals from decisions of the Chief DAS is apparent on the face of Regulation 212.2 and thus presumptively within the knowledge of petitioners. Petitioners could not reasonably assume that the Chief DAS had the "final say" on the issue. Absent some indication directly from respondent CAC that the procedural requirements of Regulation 212.2 would not be applied to area expansions, whether through decisions on earlier appeals or otherwise, it was not reasonable for petitioners to assume that CAC would not enforce the regulation. There is no evidence in this case that respondent CAC ever indicated to petitioners or anyone else that it would not enforce the regulation as it did. Accordingly, the Court finds no basis on which to rule that respondent was estopped from making the decisions challenged here.

Fourth, and finally, the Court is not persuaded by petitioner's contention that it has been prejudiced because changes in law now make it impossible for its area expansion to be approved. Petitioner's contention is based on the 1999 amendment to Labor Code section 3075. The amendment added subsection (b) to the statute, setting forth with particularity the conditions that must be met in order to justify the approval of a new apprenticeship program in a trade or in a city or trade area.

Petitioner argues that the new conditions set forth in subsection (b) are virtually impassible to meet, guaranteeing that the Chief DAS will not approve the area expansions if they were properly submitted today. The Court is unable to make such a speculative determination on the record of this case. While the new requirements of Labor Code section 3075(b) appear on their face to be somewhat stringent, whether or not they would be applied to block expansion by these petitioners appears to depend upon factual issues that are not before this Court, and are not resolvable based on the record here. The Court is aware that the so-called "need" requirement of Labor Code section 3075 has been controversial.[31] But that requirement was pan of

[31] There is a long history of litigation over the "need" requirement in state and federal courts. It is now the subject of pending federal administrative proceedings. Petitioners have submitted materials indicating that the federal Department of Labor views the recent amendments to Labor Code section 3075 as putting state law out of conformity with federal law. The federal agency has instituted proceedings to "decertify" the State of California and respondent CAC as the recognized administrator of apprenticeship programs pursuant to federal law. The question of the validity of the amendment to Labor Code section 3075 and of the "need" requirement in general are not before the Court in this proceeding and form no basis of this court's ruling.

the statute even before the amendment, and yet ayes expansions were approved.[32] The Court declines to ecu-late about how the Chief DAS and respondent CAC v uld apply the statute to any new area expansion requests. Such speculation cannot form any basis for the relief petitioners seek here.

It should be noted that the conditions set forth in subsection (b) do not appear to be as absolute as petitioners contend. Labor Code section 3075(c) permits respondent CAC to approve a new apprenticeship program notwithstanding subdivision (b) if "special circumstances, as established by regulation, justify the establishment of the program." What special circumstances might be established by regulation and found to exist in a particular case is entirely speculative. The Court cannot find that any new application by petitioner to expand its area of operations would be denied. Accordingly, the Court cannot find prejudice sufficient to support estoppel, even if other necessary elements of estoppel had been established.

V. Respondent's Decisions do not Constitute an Unconstitutional Impairment of Contracts

Petitioners allege that respondent's decisions violate the federal and state constitutional prohibitions against impairment of contracts. Specifically, petitioners allege that the decisions interfere with contracts between petitioners and various parties, including employers, education providers

[32] Including IRCC's request to expand its program to Santa Clara County referred to in footnote number 26 above.

and apprentices, in reliance on the Chief DAS' approval of their area expansions.[33]

Petitioners' contention may be disposed of simply. The constitutional prohibitions against the impairment of contracts apply only to legislative (or quasi-legislative) acts, and not to acts that are in the nature of judicial determinations. *Barrows v. Jackson* (1953) 346 U.S. 249, 260; *In re Marriage of Joseph* (1990) 217 Cal. App. 3d 1277, 1286. The decisions of respondent CAC here were quasi-judicial determinations applying a general rule (Regulation 212.2) to a specific ease. The decisions accordingly do not offend constitutional principles and are not invalid on that basis.

VI. Respondent's Decisions do not Discriminate on the Basis of Residence or Violate the Constitutional Right to Travel or Access to Education

Next, petitioners make a constitutionally-based attack on respondent's decisions, contending that they result in impermissible discrimination on the basis of residence and violate the right of prospective apprentices to travel and to have access to education and employment. These contentions are unpersuasive.

Respondent's decisions do not involve or violate these constitutional principles. Respondent ruled that the Chief DAS had improperly approved petitioners' requests to expand their areas of operations without complying with the procedural requirements of Regulation 212.2, and that

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[33] See Declaration of Patricia Black in Support of Memorandum of Points and Authorities in Support of Verified Petition for Writ of Administrative Mandamus, filed March 19, 2002.

petitioners were not permitted to operate in those expanded areas absent such proper approval. Nothing in those rulings affects the fundamental rights of prospective apprentices.

Respondent's ruling does not discriminate on the basis of residence. While the effect of the ruling is that petitioners cannot operate their apprenticeship training programs outside the areas originally designated by their approved standards (at least until the Chief DAS properly approves an application for permission to do so), nothing in the ruling prevents prospective apprentices who reside outside the areas of petitioners' programs from enrolling in apprenticeship training programs in their area of residence (even unilateral programs, if they are available). The Court finds no impermissible legal burdens or disabilities imposed on any person based solely on residence.

Similarly, respondent's rulings do not restrict the right to travel. Even if no unilateral programs are available in the areas in which petitioners intended to expand at this time, nothing in the ruling prevents prospective apprentices desiring to join petitioners' unilateral programs from moving to their approved areas of operations to join them. The ruling imposes no residency requirements or other restrictions that would affect the ability of prospective apprentices to do so. Accordingly, the Court finds no impermissible burden on the right to travel. Instead, the rulings represent an application of neutral procedural rules that are part of a general regulatory scheme applicable to apprenticeship training programs. Petitioners have not demonstrated that it is impermissible *per se* for the State to require such programs to operate in defined geographical areas and to seek permission from the administering agency before expanding into new areas

with existing programs. In fact, states may legitimately restrict the geographical location of commercial enterprises. *New Motor Vehicle Board of California v. Orrin W. Fox Co.* (1978) 439 U.S. 96, 107. Apprenticeship training programs, while technically non-profit entities, are closely related to commerce in the construction trades and thus may be subject to such regulation.[34]

For the same reasons, the rulings do not restrict access to education or employment. Prospective apprentices may enroll in approved training programs either in their area of residence or by moving to an area with an approved program.[35] Respondent's rulings merely prevent petitioners from offering programs in new areas until their expansion is approved in the manner required by law. Accordingly, the Court does not find that respondent's decisions violated constitutional principles on any of the grounds asserted.

For the same reason, the Court does not find that respondent's order that petitioners cease and desist from recruiting and enrolling apprentices outside their approved areas of operations violates constitutional principles. Since petitioners may lawfully be ordered to restrict their programs to their approved areas of operations (at least until proper approval is granted for expansion), they

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[34] As noted above, the validity of the recent amendments to Labor Code section 3075, or of the "need" requirement in general, is not before the Court in these proceedings.

[35] The Court accordingly finds no merit to the contention advanced by petitioner IRCC that respondent's rulings violate the fundamental constitutional rights of prospective apprentices as was the case in *Best v. California Apprenticeship Council* (1987) 193 Cal. App. 3d 626 (involving accommodation of an apprentice's religious beliefs).

may also be ordered, as a proper incident thereto, not to carry on their programs, or advertise the availability of their programs, outside that approved area. In the Court's view, the challenged orders do no more than that; in other words, they do no more than require petitioners to comply with the law.

VII. Petitioners Were Not Deprived of a Fair Hearing

In addition to the contentions discussed above, petitioners attack respondent's decisions on the more general ground that they were deprived of a fair hearing.

Petitioners' contention in this regard has two aspects. One is that the membership of respondent CAC is unfairly and improperly weighted towards representatives of unionized apprenticeship training programs. Petitioners argue that the CAC, as thus composed, is so philosophically and economically antagonistic to unilateral programs (such as petitioners') as to be unable to render them a fair hearing. The other contention is that several of the individual members of respondent who participated in the decisions under review here had a fatal conflict of interest by virtue of their membership in an organization that had participated in the hearings leading up to the Administrator's Decisions as an *amicus curiae*. Those members, petitioners argue, should have disqualified themselves from this matter at their request; the result of such disqualification in this matter would have been that respondent CAC would have lacked a quorum to render the decisions at issue here.

Beginning with the general contention regarding the composition of respondent, petitioners present evidence which they argue demonstrates that the overwhelming

majority of the members are affiliated with unionized apprenticeship training programs. The result, in their view, is a tribunal biased in favor of the interests of unionized programs.

The Court is not persuaded by petitioners' contention. The membership of respondent complies with law. Labor Code section 3070 prescribes the composition of the California Apprenticeship Council. In addition to two public and three *ex officio* members, the Council is to be composed of six representatives each from employers or employer organizations on the one hand, and employee organizations on the other. This plan recognizes the differing interests of employers and unions in the construction industry and provides equal representation to both. Similar plans of representation have been approved by courts for other specialized administrative boards dealing with issues specific to a given industry. See, *Friedman v. Rogers* (1979) 440 U.S. 1, 18; *American Motors Sales Corp. v. New Motor Vehicle Board* (1977) 69 Cal. App. 3d 983, 990. In this case, the evidence submitted by petitioners regarding the affiliations of respondent's members does not demonstrate a violation of Labor Code section 3070.

Petitioners argue, however, that some of the employer representatives on the Council must be seen in reality as "union affiliated" or biased because they are associated with joint programs (such as those of the real parties in interest here). Petitioners contend that unilateral, programs such as theirs are effectively unrepresented on the Council and therefore cannot obtain a fair hearing in matters such as these.

The problem with this argument, in the Court's view, is that it is based on an assumption of bias or interest without any proof of either. It is one thing to assume a potential philosophical conflict between employer and union interests. In fact, the structure of the Council recognizes and is designed to deal with such conflict. It is another thing to assume that there is a potential conflict between employer representatives affiliated with joint programs and employers who operate unilateral programs, and to translate that conflict into actual bias. Here, the bold proposition that employer representatives affiliated with joint programs are philosophically or economically antagonistic to unilateral programs is, without evidence, sheer hyperbole. The Court cannot simply accept such an assertion as the basis for declaring that the composition of respondent is somehow illegal when all evidence demonstrates that the makeup of the Council in fact complies with the law.

Something more than generalized assertions of bias is required. A party must allege concrete facts that demonstrate that the challenged decision-maker is contaminated with bias or prejudice. *Andrews v. Agricultural Labor Relations Board* (1981) 28 Cal. 3d 781, 792. To disqualify a judge, those facts must demonstrate that the judge has a direct, personal, substantial and pecuniary interest in the matter under review. *Barrwatt v. Hernandez* (1988) 205 Cal. App. 3d 823, 827, n. 5. The same rule applies to administrative bodies. *American Motors Sales Corp. v. New Motor Vehicle Board* (1977) 69 Cal. App. 3d 987, 992. Petitioners have not demonstrated that any of the members of respondent CAC had such a disqualifying interest in this matter. There alleged philosophical bias against unilateral programs is not sufficient. The question of

whether unilateral programs should have some guaranteed separate representation on the Council is thus a political one that should be presented to the Legislature, not to the judiciary.

The second aspect of petitioners' unfair tribunal contention is that certain members of the Council who are affiliated with unionized or joint programs were actually biased against petitioners in the proceedings below. The basis of this contention is that some identified members of the Council were affiliated with joint programs that were in turn members of an organization known as the California Apprenticeship Coordinators Association ("CACA"). CACA is an organization that represents the interests of joint apprenticeship training programs. It participated in the proceeding lending up to the decisions under review here, filed a brief in support of the real parties in interest and argued that the Chief DAS' approval of petitioners' expansions should be overturned.

The Court is not persuaded that the affiliation of certain Council members with programs that were members of CACA is sufficient to invalidate respondent's decisions. The fact that an organization has taken a position on an issue that may be in dispute in administrative or even judicial proceedings does not necessarily disqualify a member of that organization from ruling on a case involving that issue. Moreover, the fact that an organization has filed an *amicus* brief taking a stand on an issue does not disqualify members of that organization from hearing future proceedings on the issue. *People v. Superior Court (Mudge)* (1997) 54 Cal. App. 4th 407, 410. The *Mudge* case dealt with appellate court judges. The standards applicable to administrative agencies are somewhat less strict than those applicable to courts. See,

Gai v. City of Selma (1998) 68 Cal. App. 4th 213, 233. As noted above, administrative regulatory boards may be composed of industry representatives, even if those persons represent divergent or competing economic or philosophical interests. An administrative decision-maker is not disqualified simply because he or she has taken a public position on a policy issue related to a dispute under review. *Burrell v. City of Los Angeles* (1989) 209 Cal. App. 3d 568, 578; *City of Fairfield v. Superior Court* (1975) 14 Cal. 3d 768, 780-782. And quasi-adjudicative administrative bodies may even rule on complaints initiated by their own members. *Breakzone Billiards v. City of Torrance* (2000) 81 Cal. App. 4th 1205.

The Court has reviewed the brief CACA filed in the proceedings below and finds that CACA's participation in those proceedings is not sufficient to disqualify the members of respondent who were somehow affiliated with CACA members from participating in the decisions under review here.[36]

The Court notes that respondent's two decisions betray no signs of interest, bias, or basic lack of fairness. The decisions are facially neutral, are based on a procedural issue (lack of compliance with Regulation 212.2) and lack any overt ideological content. The two succinct decisions gave adequate consideration to the dispositive issue and properly applied the law. In fact, respondent appears

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[36] In light of the ruling made herein, the Court finds it unnecessary to reach the issues of whether petitioners properly raised their objections to the composition of the Council or to the participation of individual members below, or whether the so-called "rule of necessity" would have justified the respondent's action even if certain members were required to be disqualified.

to the Court to have made great efforts to avoid being unnecessarily punitive by crafting a remedy that would not penalize the individual apprentices who enrolled in good faith in petitioners' programs.[37] This Court is also cognizant of the fact that the members of respondent CAC voted unanimously to adopt the decisions in question, belying the contention that the decisions were the result of interest or bias.

VIII. Respondent CAC did not Violate Public Meeting Laws

Petitioner IRCC argues that respondent CAC violated state public meeting laws and basic due process by not giving proper notice of its tentative decision before the meeting at which it was adopted. IRCC's contention appears to be based solely on the allegation that the tentative decision was not placed into the public information binders until after the quarterly CAC meeting had already begun.[38] IRCC argues that such action violated the public meeting statutes contained in Government Code sections 11120, et seq.

The Court finds IRCC's contention to be without merit. The referenced statutes do not appear to require that the tentative decision should have been made available to a representative of IRCC before the meeting. Government Code section 11125 requires the notice of

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[37] See footnote 7 above. The Court does not intend to express any opinion or judgment here on the propriety or legality of that remedy, which is the issue raised by the cross-petition.

[38] See, IRCC's Memorandum of Points and Authorities in Support of Complaint for Declaratory Relief and Petition for Writ of Mandate, etc., filed August 16, 2001, pp. 21:25-22:8.

meeting of a state body to include a specific agenda containing a brief description (which generally need not exceed 20 words) of the items of business to be transacted or discussed. There is no allegation that the notice of respondent CAC's meeting was not accompanied by a proper agenda with a brief description of the item involving the tentative decision. Government Code section 11125.1(b) states that writings that are public records and that are distributed to members of the state body prior to or during a meeting, pertaining to any item to be considered during the meeting, shall be made available for public inspection at the meeting. This provision appears to have been complied with. IRCC has not identified any other authority that would have required respondent to serve it with a copy of the tentative decision prior to the meeting. The Court thus fords no basis upon which to invalidate respondent's decision.

IX. Respondent Properly Found that the Appeal in the IRCC Matter was not Time-Barred

Finally, petitioner IRCC argues that respondent CAC improperly found that the appeal of the 10 Bay Area Counties JATC from approval of its expansion was not time-barred. The Court finds that respondent ruled correctly on this issue.

Regulation 212.2(j) provides that the decision of the Chief DAS approving or disapproving proposed standards shall be final unless an appeal is filed with respondent within thirty days of service of the decision. In this case, the Chief DAS did not comply with the regulation and thus did not serve notice of the approval of IRCC's expansion on real party in interest.

The facts, which are undisputed, demonstrate that the Chief DAS approved IRCC's expansion in two phases, in August and December 1998. Real party in interest learned of petitioner's expanded operations sometime thereafter and wrote a letter to DAS complaining about the revision of IRCC's standards on February 19, 1999.[39] Since the Chief DAS did not comply with the provisions of Regulation 212.2, the time for an appeal pursuant to the regulation had not begun to run. Given the confused procedural posture of this matter, real party in interest acted reasonably to raise and preserve the issue. Respondent accordingly did not abuse its discretion by finding that real party in interest's February 19, 1999 letter should be considered as a timely appeal.

X. Conclusion

For the reasons stated above, the Court finds that respondent's two decisions properly applied the applicable regulation and found the approval of petitioners' geographical expansions to be invalid on procedural grounds. Respondent's decisions do not violate constitutional principles and were not rendered by a biased or unfair tribunal. The petitions for writ of mandate are denied.

Counsel for respondent are directed to prepare an order denying the petitions and to submit the order to counsel for petitioners and real parties in interest for approval as to form (FAX is permissible) before submitting it to the Court for signature and filing. The parties are also directed to meet and confer and to contact the Court regarding further proceedings, if any, on the cross-petition.

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[39] IRCC Administrative Record, pp. 073-074.

Dated: JUL 31 2002

/s/ Talmadge R. Jones
HONORABLE TALMADGE R. JONES
JUDGE OF THE SUPERIOR COURT

DESMOND CAPERS et al., Plaintiffs and Appellants, v. HENRY P. NUNN as Chief etc., Defendant and Respondent; SHEET METAL WORKERS' INTERNATIONAL ASSOCIATION LOCAL UNION NO. 104 et al., Interveners and Respondents. AIR CONDITIONING TRADES ASSOCIATION UNILATERAL APPRENTICESHIP PROGRAM, Plaintiff and Appellant, v. CALIFORNIA APPRENTICESHIP COUNCIL, Defendant and Respondent, SHEET METAL WORKERS' INTERNATIONAL ASSOCIATION LOCAL UNION NO. 104 et al., Real Parties in Interest and Respondents.

S128180

SUPREME COURT OF CALIFORNIA

2004 Cal. LEXIS 11181

November 17, 2004, Filed

JUDGES: Brown, J., was absent and did not participate.

OPINION:

Petition for review denied.

Brown, J., was absent and did not participate.

BEFORE THE
CALIFORNIA APPRENTICESHIP COUNCIL

SHEET METAL WORKERS' INTERNATIONAL ASSOCIATION LOCAL UNION NOS. 104, 108 AND 162, Charging party, Appellee, v. AIR CONDITIONING TRADES ASSOCIATION UNILATERAL APPRENTICESHIP COMMITTEE, Respondent, Appellant.	DAS Case Nos. 97-S-11 and 99-13 DECISION

FACTS AND PROCEDURAL HISTORY

On August 6, 1993, the California Apprenticeship Council ("CAC") approved the standards of the Air Conditioning Trades Association Unilateral Apprenticeship Committee ("ACTA"). The standards provided that ACTA's geographic area was Merced, Stanislaus, Mariposa and Tuolomne Counties ("The Original Area"). The standards provided for affirmative action goals based on The Original Area and for related instruction to be given in The Original Area.

ACTA subsequently expanded its area of recruitment and related instruction into other Counties. The Division of Apprenticeship Standards ("DAS") did not approve the expansion and notified ACTA that the expansion was not authorized.

In June, 1997, the Sheet Metal Workers' International Association Local Union Nos. 104, 108 and 162 ("Sheet Metal Workers") filled [sic] a complaint With the Administrator

of Apprenticeship concerning ACTA's expansion. A hearing on the complaint was held on April 10 and 11, 2001. On July, 19. 2001 [sic], the Director of the Department of Industrial Relations issued a decision on the complaint. The Director found that ACTA had violated its procedures for the selection of apprentices, had recruited apprentices outside its Original Area and had used Local Educational Agencies that were not approved by DAS and were not set forth in its standards. The Director found that DAS had not approved the expansion. Additional facts are stated in the Director's decision.

The Director ordered ACTA to cease and desist these practices and to comply in all respects with its standards as approved by CAC on August 6, 1993.

ACTA timely appealed the Director's decision to CAC. The Council received extensive briefing from the parties and from the Division of Apprenticeship Standards. CAC appointed members Max Turchen, Bert Tolbert and Lawrence Kay to a panel to make a recommendation on the appeal to CAC. The panel reviewed the administrative record and presented its recommendation at the CAC meeting on January 24, 2002.

DECISION

1. An evidentiary hearing on these appeals is not necessary because the Director's decision is based on an evidentiary hearing, because the parties did not request a hearing and submitted extensive briefs and because the issues to be decided are primarily legal.

2. The CAC upholds all of the Director's factual findings and legal conclusions. The CAC notes that the record does

not show that ACTA completed its application to DAS for approval of the expansion and thus has not exhausted its administrative remedies. However, if the facts establish that the application was completed, DAS' disapproval of the application was correct. There is no evidence to support ACTA's assertion that DAS approved its expansion or is estopped from denying the application to approve the expansion.

3. ACTA is ordered as follows:

   a. To comply, in all respects, with its standards approved August 6, 1993 by CAC; and as properly amended

   b. To cease and desist from using any apprentice selection method not expressly approved and set forth in its standards;

   c. To cease and desist from recruiting or utilizing selection methods that result in the recruitment or enrollment of apprentices who reside outside of Merced, Stanislaus, Mariposa and Tuolomne Countries [sic];

   d. To cease and desist from using learning educational agencies other that as set forth in its approved standards.

4. DAS is requested to consider whether there is cause for the deregistration of ACTA and what measures, if any, should be taken for the welfare of those apprentices who were improperly recruited. DAS is further requested to conduct an investigation of the training, education and employment of ACTA's apprentices. The Council will retain jurisdiction over the question of what to do about ACTA's apprentices pending the results of DAS' investigation. If the investigation demonstrates that those apprentices are

not being lawfully trained, educated or employed, the Council will issue further orders as necessary.

DATED: 1-24-02

Jeannie J. Holmes
CHAIRMAN, CALIFORNIA
APPRENTICESHIP COUNCIL

RECOMMENDATION

We recommend that the Council adopt the above decision.

/s/ Max Turchen
Max Turchen

/s/ Bert W. Tolbert
Bert Tolbert

/s/ Lawrence Kay
Lawrence Kay

CALIFORNIA APPRENTICESHIP COUNCIL

APPEAL OF DESMOND GAPERS, DUANE TREVETHEN, DIANE NESS, ERIC KENDALL, JENNIFER BATTS AND JUSTIN GARCIA	DECISION

FACTS AND PROCEDURAL HISTORY

On March 25, 2002, appellants Desmond Capers, Duane Trevethen, Diane Ness, Eric Kendall, Jennifer Batts and Justin Garcia requested Chief, DAS to reverse his refusal to sign DAS-1 forms for apprentices to the Air Conditioning Trades Association unilateral apprenticeship program ("ACTA") on the basis of residence. Appellants argued that the refusal violated their fundamental rights to education and travel.

On June 20, 2002, Chief DAS, on behalf of the Administrator of Apprenticeship, dismissed appellants' complaint on the ground that the Council's decision of January 24, 2002 prohibits ACTA from using selection methods that result in the enrollment of apprentices who reside outside the Counties of Merced, Stanislaus, Mariposa and Tuolomne. The Chief further determined that the prohibition did not infringe on fundamental rights to education and travel.

Appellants appealed the dismissal to the Council. The Council appointed members Max Turchen, Bert Tolbert and William Callahan to a panel to make a recommendation on the appeal. The panel reviewed the administrative record and presented its recommendation at the Council's

meeting on October 24, 2002. Appellants did not request a hearing before the Council.

DECISION

The dismissal of the appellants' complaint is affirmed on the grounds stated in the Council's decision of January 24, 2002 Dismissing the ACTA appeal and on the additional grounds stated in the Chief's decision in this matter.

DATED: 1-24-02

Jeannie J. Holmes
CHAIRMAN, CALIFORNIA
APPRENTICESHIP COUNCIL

RECOMMENDATION

We recommend that the Council adopt the above decision.

/s/ Max Turchen
Max Turchen

/s/ Bert W. Tolbert
Bert Tolbert

/s/ William T. Callahan
William Callahan

BEFORE THE
ADMINISTRATOR OF APPRENTICESHIP
OF THE TATE OF CALIFORNIA

SHEET METAL WORKERS' INTERNATIONAL ASSOCIATION LOCAL UNION NOS. 104, 108 AND 162, Charging Party, vs. AIR CONDITIONING TRADES ASSOCIATION UNILATERAL APPRENTICESHIP COMMITTEE, Respondents.	Case Nos. 97-S-11 and 99-13 DECISION

INTRODUCTION

Sheet Metal Workers' International Association Local Union Nos. 104, 108 and 162 (Charging Party) filed a complaint on June 11, 1997 and a second complaint on October 13, 1999, with the Division of Apprenticeship Standards ("DAS"). The complaints were designated as 97-S-11 and 99-13 respectively and were consolidated for hearing. Both complaints named Air Conditioning Trades Association Unilateral Apprenticeship Program as respondent ("ACTA UAP" or "Respondent").

DAS determined that some of the allegations in the complaints were untimely or lacked merit. DAS also determined that certain allegations did have merit and warranted a hearing and referred additional issues for hearing.

In summary, the issues DAS referred for hearing were the following:

1. Did ACTA UAP act in excess of its apprenticeship agreement, "Apprenticeship Standards of the Air Conditioning Trades Association Joint (sic) Apprenticeship & Training Committee" (Approved Standards or Standards) by recruiting apprentices outside of the geographic area provided for in its Standards? (Compl. #97-S-11, First Claim.)

2. Did ACTA UAP follow the procedures for the selection of apprentices set forth in its Approved Standards? (Compl. # 99-13, Second Claim.)

3. Did ACTA UAP utilize Local Educational Agencies (LEA) that were not approved as part of its Standards? (Compl. #97-S-11, Second Claim and Compl. #99-13, Third Claim.)

4. Did ACTA UAP use instructors that were not certified by an approved LEA? (DAS Acosta File, 97-S-11, Tab, "Investigation.")

In addition, the Charging Party in its two complaints, which it sought to prosecute notwithstanding DAS' prior determination that they were without merit or were untimely, raised other allegations. In summary, they are:

1. ACTA UAP failed to provide related and supplemental instruction to apprentices on a frequent and continuing basis and reasonably proximate to where the apprentices' on-the-job training was taking place. (Compl. #97-S-11, Third Claim.)

2. ACTA UAP did not maintain adequate records of on-the-job work hours and hours of related and supplemental

instruction and did not maintain apprenticeship agreements. (Compl #97-S-11, Fourth and Seventh Claim.)

3. ACTA UAP did not pay or did not pay sufficient contributions to an employer benefit plan or plans as required by its Approved Standards. (Compl. #97-S-11, Fifth Claim.)

4. ACTA UAP did not pay or require employers to pay apprentices the appropriate rate of compensation. (Compl. #97-S-11, Sixth Claim.)

5. The Charging Party was not served with ACTA UAP's proposed revisions to its Approved Standards as required by DAS regulations. (Compl. #99-13, First Claim.)

PROCEDURAL BACKGROUND

On December 20, 2000, the Charging Party was informed by letter that a Hearing Officer was appointed to conduct the hearing as to both complaints. By letter of December 22, 2000, all parties were so notified.

One telephonic pre-hearing conference was conducted on January 19, 2001, with all parties, through their respective counsel, participating. During the pre-hearing conference the parties agreed to exchange documents they intended to rely upon in support of their positions. The parties were informed that the exchanged documents would be made part of the record. Each party exchanged documentary evidence in accord with their agreement prior to the hearing being scheduled.

Each party was also given the opportunity to provide the Hearing Officer and each other party with a position

letter outlining their respective factual and legal positions with respect to any issue raised in the complaints, including those determined to be without merit or untimely by DAS. Only the Charging Party provided its position statement dated February 21, 2001.

The parties were notified by letter of March 9, 2001, that the hearing was scheduled for April 10 and 11, 2001. The hearing was held before the Hearing Officer on April 10, 2001 and April 11, 2001, and was transcribed by a certified court reporter.

Each party was given an opportunity to and did submit documentary evidence prior to the hearing. In addition, during the hearing each party had the opportunity to present witnesses, to cross-examine witnesses and to present additional documentary evidence. Post-hearing argument, by agreement of the parties, was submitted in written form. Each party had the opportunity to and did submit written briefs and reply briefs. The last post-hearing reply brief was served on June 4, 2001 and received by the Hearing Officer on June 7, 2001. By agreement of the parties, the matter was submitted for decision upon receipt of the last reply brief on June 7, 2001.

The documentary evidence submitted by the parties prior to and at the time of the hearing as well as the written briefs (with an exception discussed below), together with the transcript of the hearing, constitutes the record in this matter.

FINDINGS OF FACT

1. The "Apprenticeship Standards of the Air Conditioning Trades Association Joint Apprenticeship & Training

Committee" was approved by the California Apprenticeship Council effective, August 6, 1993.

2. The Standards provide at Article III that the geographic coverage is for the counties of Merced, Stanislaus, Mariposa and Tuolomne. The Addendum to the Apprenticeship Standards also defines the "Area Covered by Standards and Approved Statistical Area" as the counties of Merced, Stanislaus, Mariposa and Tuolomne.

3. The Standards (at Addendum II-"Affirmative Action Plan") provides for ACTA UAP's affirmative action goals as to minority and women apprentices. The goals and statistical bases for the goals are premised on the Standard's recruitment geographical coverage in Merced, Stanislaus, Mariposa and Tuolomne counties.

4. The Standards (at Addendum III – "Selection Procedures") provide that the "Selection of Apprenticeship Applicants will be Method Number Four (4)." The written selection procedure provides for minimum qualifications, selection devices, ranking, a description of procedures applicable to qualified applicants, how prior experience will be treated and a review process.

5. The selection procedures under "Ranking" provide, in relevant part, that: "D. A ranked listed (sic) of eligible applicants will be established and maintained for two (2) years."

6. The selection procedures under "Qualified Applicants" provide, in relevant part, that: "B. The JATC will refer qualified applicants to job openings by rank in descending order from the eligible list and will be sent to the employer for placement in the Apprenticeship Program."

7. The Standards provide that "related instruction will be supplied by the Modesto Junior College."

8. Notwithstanding the provision in the written Approved Standards, ACTA UAP either utilized Local Educational Agencies (LEA) or had agreements with LEAs to provide related instruction not within the Modesto Junior College District. These LEAs included: Fresno County Office of Education/Fresno Unified School District; Martinez Unified School District/Adult Education; San Juan Unified School District; Santiago Canyon College (Orange County); and Sacramento City College.

9. ACTA UAP entered into an agreement with Martinez Unified School District for that institution to act as ACTA UAP's LEA. The agreement provided, in part, that ACTA UAP was to "secure necessary credentials for the instructors as required by the District (Martinez Unified School District) and by California law."

10. ACTA UAP's instructors Dale Armstrong, Hal Scholl, Steve Torres and Baburaj Dharani were not certified by Modesto Junior College or by Martinez Unified School District to provide instruction. E. Dale Armstrong, however, did hold a Community College Instructor Life Credential, and Harold P. Scholl held a teaching credential issued by the Commission on Teacher Credentialing. ACTA UAP did have some attendance forms showing that certain apprentices attended classes at several locations within the Martinez Unified School District, including Hoover High School and at a private residence.

11. ACTA UAP submitted a petition in letter form dated May 12, 1994, to the Chief of DAS to "expand the Air Conditioning Trade Association Unilateral Training Committee's geographic area to include the forty-six (46)

Northern California Counties. (Tulare-Kings County north to Oregon)." Chief of DAS has not yet approved that petition. There were other revised standards used by ACTA UAP which do not show the signature of DAS' chief approving the revisions. A revision of August 1, 1997 was sent to the Los Angeles Unified School District. This revision shows the purported signature of Len Viramontes, Senior Apprenticeship Consultant for DAS, but does not show the required signature of DAS' chief. Also, ACTA UAP produced a revision to its standards dated April 20, 1998. Similarly, this revision shows the purported signature of Len Viramontes, but not that of DAS' chief.

12. On February 3, 1997, DAS' chief approved a "revision of Approved Standards (DAS Form 24). That revision continued to list the areas covered as Mariposa, Merced, Stanislaus and Tuolumne counties and the school as Modesto Junior College.

13. Communications took place between DAS and ACTA UAP regarding revisions to ACTA UAP's Approved Standards. These communications show that the approval process was ongoing, at least through the dates of the correspondence.

14. On May 29, 1996, DAS informed ACTA UAP by letter that "in order for ACTA to continue its geographic expansion outside its approved area, it is imperative that you submit revisions to standards which reflect labor market serviced." On June 7, 1996, ACTA UAP submitted its proposed revisions to DAS.

15. On July 2, 1996, DAS informed ACTA UAP by letter that the proposed revisions were returned as not approved.

16. On January 16, 1997, DAS sent ACTA UAP a certified letter notifying ACTA UAP that the apprenticeship program would be deregistered unless corrective action was taken within 30 days. The letter states that ACTA UAP violated federal and state law and regulation "and is not being operated in accordance with the approved program standards as required by state and federal law and regulation." The bases for the violations were that ACTA UAP failed to follow its selection procedure and that apprentice and program records were not being maintained. On January 31, 1997, ACTA UAP responded, also be [sic] letter, stating that it would conform its selection procedures to that outlined in its Approved Standards. ACTA UAP also stated that it was considering "changing its selections procedure, to include letters of subscription from participating contractors."

17. The method used for the selection of apprentices into the ACTA UAP apprenticeship program in Alameda, Contra Costa, Marin, Sonoma and Solano counties during the period of 1995 through 1998 was that employers would refer their current employees to the program. The potential apprentices would be orally interviewed and forms filled out. Ninety-nine percent of the apprentices so interviewed would be accepted into the program.

18. For the apprenticeship committee covering the counties of Alameda, Contra Costa, Marin, Sonoma and Solano, ranked lists of eligible applicants were not maintained. There was no system maintained for referring apprentices to other contractor employers if the apprentice's job ended.

19. Ray Greasner, a principle of Standard Sheet Metal, approached Mark Joseph Oaxaca, his employee, to

participate in sheet metal training classes. Mr. Oaxaca attended classes at Hoover High School and Ray Greasner's home. He could not recall if he was actually enrolled as an apprentice in the ACTA UAP program, and there was no documentation presented to show that he was actually enrolled as an apprentice in the ACTA UAP program.

20. Jaima Garcia Vuscanamte[1] worked at All Temperature controls in the Los Angeles area of Chatsworth in 1996. His boss at All Temperature asked him, along with 15 to 20 other current All Temperature employees, to participate in the ACTA UAP apprenticeship program. He filled out paperwork, signed an application, was orally interviewed and was given a 10- to 15-page packet relating to the apprenticeship program. He attended classes at All Temperature and turned in a monthly report to his teacher listing the hours worked by job category. He left the ACTA UAP program because he was dissatisfied with the quality of teaching.

21. Mr. Vuscanamte was asked to again participate in the ACTA UAP program in May of 1999 by Dave Clark of Dave Clark Mechanical. He signed some paperwork and an application regarding the ACTA UAP apprenticeship program given to him by his employer but told his employer that he would not attend classes given what he believed was poor instruction. Although the DAS Form 1, countersigned by Dave Clark as President of Dave Clark Mechanical, Inc., represents that training commenced on

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[1] This is the spelling reflected in the transcript of the hearing. The DAS Form 1 referred to in the hearing for both All Temperature and Clark Mechanical shows the spelling as "Bustamante."

March 1, 2000 for Mr. Vuscanamte, he did not attend any ACTA UAP training classes after signing the application forms.

22. DAS' practice and policy is that apprentices, once enrolled, can work anywhere within the state irrespective of the apprenticeship program's geographic limitations expressed in its approved standards. An internal DAS memorandum dated January 8, 1998, from "Program Planning/Review" to Len Viramontes states that "contractors can now work apprentices throughout the State, and there are no DAS-imposed geographical restriction on committees regarding the recruitment of contractors . . . "

23. ACTA UAP advertised its apprenticeship programs outside of Merced, Stanislaus, Mariposa and Tuolomne counties. This advertising included meeting notices for the Sacramento ACTA UAP Training Committee and the Visalia ACTA UAP Training Committee. ACTA UAP also advertised its training programs in the Fresno Bee.

24. An October 8, 1996, internal DAS memorandum from Len Viramontes, Senior Apprenticeship Consultant for DAS, to Rita Tsuda, Deputy Chief for DAS, states that: "On Monday, October 7, 1996, during our conversation, you mentioned that all of the apprenticeship agreements that we were holding for ACTA & PHCC to go ahead and process them. The agreements in questions were the apprenticeship agreements that are out of the approved jurisdictional area of coverage of this committee." (¶) "According to your instruction I will process all apprenticeship agreements regardless if there is a DAS 7 on file or not and regardless if they are recruited out of their jurisdictional area." The memorandum shows that copies

were only sent to Rulon Cottrell, Chief, and to Mike Mortell, Area Administrator.

25. Of the DAS Form 1's produced by ACTA UAP, 52 are signed prior to October 1996 and show that the apprentices' counties of residence are in counties outside of Merced, Stanislaus, Mariposa and Tuolomne. Two hundred ninety-nine of the DAS Form 1's produced by ACTA UAP were signed after October 1996 and show that the apprentices' counties of residence are in counties outside of Merced, Stanislaus, Mariposa and Tuolomne. The period of time covered by the DAS Form 1's submitted by ACTA UAP is from 1993 through 2001. Approximately 20 DAS Form 1's, irrespective of time period, were signed by apprentices residing in Merced, Stanislaus, Mariposa and Tuolomne counties. It cannot be determined if the DAS Form 1's produced by ACTA UAP represent all the apprenticeship agreements executed by apprentices prior to participating in, or signed in expectation of participating in, ACTA UAP's apprenticeship program during the period of 1993 through 2001.

26. On January 22, 1998, ACTA sent a list of apprentices "who reside in and around the Los Angeles area" to the contract compliance officer for the Los Angeles Unified School District. The enclosure listed 17 individuals as of January 19, 1998.

27. A letter purportedly signed by Len Viramontes, Sr. Consultant, and dated September 18, 2000, states in relevant part that: "On behalf of the State of California Department of Industrial Relations/Division of Apprenticeship Standards, this letter is to certify that Air Conditioning Trades Assoc. (ACTA), is a state-approved apprenticeship training facility; with coverage consisting

of the entire state of California, since 1994." (¶) "ACTA is state-approved to train apprentices under DAS File Number 19421." The letter is addressed to "To Whom it May Concern" and shows no other routing or copy.

28. DAS has not approved any geographic expansion of ACTA UAP's coverage from that expressed in its August 1993 Approved Standards for Merced, Stanislaus, Mariposa and Tuolomne counties. DAS has not approved any apprentice selection method or methods other than that expressed in its August 1993 Approved Standards.

29. ACTA UAP was served with a Notice of Complaint and Charging Party's Complaint No. 97-S-11 on or about June 19, 1997.

30. Charging Party's Complaint No. 99-13 was sent to ACTA UAP's counsel for a response on or about October 2, 2000. That response was forthcoming on or about November 7, 2000.

DISCUSSION

A. PROCEDURAL ISSUES.

1. Did DAS' Determination of Lack of Merit or Untimeliness of Certain Allegations Preclude the Charging Party From Going Forward on Those Allegations?

During the January 19, 2001 pre-hearing conference, a question was raised as to which allegations of the two complaints survived DAS' determination that certain allegations were untimely or without merit. The Hearing Officer informed the parties that no party would be precluded from raising any issue or presenting any evidence on an issue raised in the complaints at the time of the

hearing and that the question of issue preclusion was deferred. Any party was free to raise or argue the effect of DAS' determination at the hearing. No party, however, submitted authority or argument on this issue at the hearing or in the parties' post-hearing briefs.

Since the Charging Party, in its pre-hearing statement of February 21, 2001, did assert issues found to be untimely or without merit by DAS and since the question of issue preclusion was deferred by the Hearing Officer, it will be addressed.

Title 8, California Code of Regulations, Section 202(a)[2] provides, in relevant part, that:

> The Administrator of Apprenticeship shall dismiss any complaint that is not timely filed and may, following an investigation, dismiss any complaint that is found to be without merit." In such cases the Administrator of Apprenticeship shall prepare a statement of his/her findings and determinations and file it with the California Apprenticeship Council, and shall notify all parties to the complaint in writing in accordance with the Code of Civil Procedure sections 1013a and 2015.5 of his/her determination to dismiss the complaint. . . . If any party to the complaint requests a hearing within 10 days of receipt of the notice of dismissal of the complaint, the Administrator or his/her duly authorized representative shall conduct a hearing in the same manner as set forth in subdivision (b).

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[2] All subsequent references are to Title 8, California Code of Regulations, unless otherwise specified.

The regulations do not distinguish between a complaint that raises a single issue or a complaint that contains separate causes of action or claims. It would be anomalous to interpret section 202(a) to provide notice to parties only when an entire complaint is dismissed and not require notice when distinct claims or causes of actions are dismissed, leaving the balance of the claims or causes to proceed. Accordingly, the Charging Party should be allowed to proceed to hearing on all of its claims or causes unless the required notice was given to the parties and the parties had the opportunity to request a hearing on the claims sought to be dismissed by the Administrator of Apprenticeship.

Here, there was no evidence that any notice in conformity with the requirements of section 202(a) was given to any party. At best, a letter dated July 22, 1998 from DAS' consultant, Leonard Viramontes, was sent to counsel for the Charging Party stating that he (Mr. Viramontes) was going to recommend dismissal. This letter does not meet the requirements of section 202(a). In any event, Lucille Acosta, DAS Area Administrator, acknowledged in her letter of June 1, 2000 to counsel for the Charging Party, in effect, that the recommendation to dismiss was never made or, at least, was never acted upon.

Had timely notice been given the Charging Party of DAS' intent to dismiss portions of the complaints, the Charging Party would have been entitled to request a hearing. The Charging Party, in this situation, however, suffered no prejudice since it was allowed to go forward and present evidence as to all of its allegations contained in the two complaints during the April 2001 hearing. Having had the opportunity to proceed, the Charging Party is not entitled to any additional hearing on those

allegations that DAS determined to be without merit or untimely.

2. Was Respondent Provided With Notice as to the Remedies Sought by the Charging Party?

ACTA UAP raised an issue in its post-hearing brief that it had no notice of the penalty or sanctions sought to be imposed against it. Without citation to authority, ACTA UAP argues that it was consequently deprived of due process.

ACTA UAP did not offer any evidence or testimony during the hearing that it had no knowledge of the Charging Party's complaints, the allegations in the complaints or the relief sought. The record also shows that with respect to Complaint No. DAS 97-S-11, a Notice of Complaint Received and the complaint itself was served by mail on ACTA UAP on or about June 19, 1997. Complaint No. DAS 99-13 was sent to ACTA UAP's counsel for a response on October 2, 2000. ACTA UAP's counsel's response was forthcoming on or about November 7, 2000.

Both complaints pray for identical relief, in relevant part, that Respondent's apprenticeship program be deregistered "under the authority of S.C.C.R. §212.4(b)" and "under section 13(b) of the California Plan For Equal Opportunity and Apprenticeship." (Complaints 97-S-11 and 99-13 at prayer, paragraphs (3) and (4).)

Accordingly, ACTA UAP's claim that it did not have notice of the relief sought against it is rejected.

3. The Charging Party's Burden of Proof.

Respondent, in its opening brief, argues that it was not informed what burden of proof standard the Charging Party would be required to meet in order to prove its claims. Respondent neither provides any legal authority to establish what the appropriate burden is nor does it suggest what the burden should be.

At the commencement of the hearing, the parties were informed that the Charging Party had the burden of establishing its case. In other words, the Charging Party had the burden of producing evidence within the meaning of Evidence Code sections 110 and 550.

The burden of proof, on the other hand, unless law imposes some heightened standard, is proof by a preponderance of the evidence under Evidence Code section 115. Accordingly, the Charging Party's burden is by a preponderance of the evidence.

4. Submission of New Evidence by ACTA UAP.

Respondent, in its opening brief, offered additional exhibits "B" through "E." These exhibits were neither exchanged prior to the hearing nor at the hearing.

DAS' assertion that these are late filed is taken to be an objection to their admission. This objection is sustained. There was no request to leave the record open for additional evidence, there was no agreement of the parties that additional new evidence could be received and there has been no showing that this proffered evidence was somehow unavailable to ACTA UAP prior to the close of the hearing.

ACTA UAP also references, but does not attach, the declaration of Henry S. Nunn allegedly submitted in another pending proceeding between these parties. (Respondent's Op. Br. at page 5.)[3]

The parties were allowed to attach or reference the pending civil writ proceedings, no representation was made as to what weight, if any, would be given to those references. In this situation, however, Mr. Nunn's declaration is not admissible. Even though the hearing was not conducted "according to technical rules relating to evidence and witnesses" (section 202(b)(3)), it is unfair to allow testimony submitted by way of declaration after the record is closed and where the parties neither consented to that submission nor had the opportunity to examine the declarant.

5. Are the Parties Entitled to Receive the Hearing Officer's Proposed Decision Prior to the Issuance of the Final Decision by the Director of the Department of Industrial Relations?[4]

At the conclusion of the hearing, ACTA UAP requested that the Hearing Officer's proposed decision be given to it. This oral request was followed by a letter of May 9, 2001.

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[3] Petition for Preemptory Writ of Mandate, *Air Conditioning Trades Association Unilateral Apprenticeship Committee v. Division of Apprenticeship Standards, Henry P. Nunn and Sheetmetal Workers International etc. et al,* San Francisco Superior Court Case No. 318718. Although the Hearing Officer did receive courtesy copies of some of the pleadings in the writ proceeding, declarations were never submitted.

[4] The regulations use the terminology of "Administrator of Apprenticeship." Under Labor Code section 3072 "The Director of Industrial Relations is ex officio the Administrator of Apprenticeship and is authorized to appoint such assistants as shall be necessary to effectuate the purpose of this chapter."

Under section 202(c) and (d), the Administrator of Apprenticeship issues a decision on the complaint based on the entire record and after considering the Hearing Officer's written recommendations. There is no final decision until one is issued by the Administrator of Apprenticeship.

There is nothing in statute or regulation, nor has ACTA UAP offered any authority, that provides that a party is entitled to receive the Hearing Officer's recommendations or proposed decision. There is, however, authority to the contrary. In *Bollinger v. San Diego Civil Service Commission* (1999) 71 Cal.App.4th 57-577, 84 Cal.Rptr.2d 27, the court held that a party had no right to receive a Hearing Officer's proposed decision. In addition, citing to *Dami v. Dept. of Alcoholic Bev. Control* (1959) 176 Cal.App.2d 144, 154, 1 Cal.Rptr. 213, the court also recognized that there was no constitutional principle implicated by not giving a party a proposed decision.

Consequently, neither the Respondent nor any party is entitled to receive the proposed decision.

6. ACTA UAP's Assertion That the Complaints are Untimely.

Based on the testimony of Mr. Paul McDonald Harrison concerning his involvement with ACTA UAP training programs from 1995 to 1998, ACTA UAP asserts that the complaints are untimely and should be dismissed. Section 201(a) provides for time limitations for the filing of complaints based on various violations. A complaint is issued "when there is cause to believe that a decision, order or action of an apprenticeship program sponsor has been

unfair or unreasonable; or that there has been a violation of: . . . [regulations and agreements]."

No evidence was proffered, however, as to when Charging Party had or should have had "cause to believe" that some violation had occurred. A witness's testimony that there were violations covering a broader period of time than that suspected by a complainant would not retroactively trigger the statute. It would still need to be shown, by competent evidence, that the complainant had "cause to believe" that a violation occurred and failed to take action within the applicable period. Since ACTA UAP failed to proffer any evidence to show that Charging Party had "cause to believe" within either a 30- or 180-day period that a violation occurred, the argument is rejected.

B. ACTA UAP's USE OF LEAs, INSTRUCTOR QUALIFICATION AND FREQUENCY AND LOCATION OF RELATED TRAINING.

The Approved Standards for ACTA UAP provide that "related instruction will be supplied by Modesto Junior College." ACTA UAP had, for some time beginning in 1994, attempted to change its Standards. For the most part, DAS approval has not been forthcoming. There are certain revisions to the Standards showing that some changes, not relevant here, were approved by DAS, but which also show that Modesto Junior College continued to be the only approved LEA listed.

There is ample evidence that ACTA UAP did use LEAs other than Modesto Junior College. ACTA UAP submitted numerous documents that it had entered into or was attempting to enter into agreements with educational agencies other than Modesto Junior College to provide for

related instruction. These agreements may be a prerequisite to obtaining DAS approval of amended Standards, but DAS approval is still required. In this case, Modesto Junior College remains the only approved LEA and ACTA UAP's use of other LEAs even if furnished pursuant to agreement between ACTA UAP and those educational agencies, is a violation of ACTA UAP's Approved Standards.

Since ACTA UAP's use of Martinez Adult School violates its Standards, the use of alternate class locations, such as Hoover High School, is subsumed within the violation of its Standards whether Martinez Adult School approved of the practice or not. In other words, the use of alternate class locations will not be treated as separate and distinct violations.

In addition, testimony established that instructor certification is a determination made by the individual LEA and not DAS. The agreement between ACTA UAP and Martinez Unified School District, for example, provides that the "[p]rogram sponsor shall secure necessary credentials for the instructors as required by the District [Martinez Unified School District] and by California law." Here, there was no evidence proffered to show what the District's requirements were and if ACTA UAP's instructors fulfilled those requirements. At best, ACTA UAP offered a letter from Tulare County Office of Education to the effect that E. Dale Armstrong held a Community College Instructor Life Credential and that Harold P. Scholl held a teaching credential issued by the Commission on Teacher Credentialing. ACTA UAP also offered documents reflecting student attendance at classes and names of instructors. None of these documents, however,

show that Mr. Scholl and Mr. Armstrong or other instructors were certified by the school district.[5]

Apart from the issue of LEA certification of instructors, DAS also contends that the quality of instruction was deficient. Neither DAS nor the Charging Party met its burden concerning the quality of instruction provided by ACTA UAP's instructors. The testimony of witnesses Mark Joseph Oaxaca and Jaima Garcia Vuscanamte as to the quality or lack of quality of instruction is given no weight since the witnesses were not shown to be competent to testify as to instructor qualification requirements and whether the instructors met those qualifications. The witnesses' mere preferences or opinions as to teaching ability or ability to communicate are insufficient to show that the witnesses are competent to testify as to even minimum instructor qualifications.[6]

Charging Party also failed to produce sufficient evidence to meet its burden with respect to its allegation that ACTA UAP failed to provide related and supplemental instruction on a frequent and continuing basis and at locations proximate to the on-the-job training. There was testimony that related and supplemental shop instruction was provided at several locations. While not specifically delineated, that training occurred on some periodic or even regular basis. This testimony contradicts the substance of

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[5] Testimony established that Mr. Baburaj Dharani also served as an instructor for ACTA UAP. Since documents relating to Mr. Dharani were not timely submitted, they are not considered.

[6] Documents submitted by DAS as part if its investigative summaries included the declaration of Charles Whitehead. Since Mr. Whitehead was not called as a witness, the declaration was not considered.

the allegations and, consequently, Charging Party's allegations in this regard cannot be sustained.

C. ACTA UAP'S COMPLIANCE WITH ITS PROCEDURES FOR SELECTION OF APPRENTICES.

Section 205(f) and 215, provide certain requirements that procedures for the selection of apprentices be included as a part of a program's standards. At a minimum, those procedures must be in writing, comply with Federal regulation and must be approved by DAS' chief. That is, the selection procedure must be spelled out in writing as part of a program's approved standards. 29 Code of Federal Regulations section 30.5(b)(1)-(4) spells out allowable selection procedures. Under subparagraph (4) "A sponsor may select apprentices by means of any other method [other than subsections (1) through (3) of that section including its present selection method . . . "

Accordingly, a plan may use a method of apprenticeship selection different than that provided in subsections (1) through (3) of 29 CFR 30.5(b), but that method must still be detailed in writing and be given DAS' approval.

ACTA UAP did spell out its selection procedure in writing and received DAS approval for that procedure. In summary, ACTA UAP's selection procedures provide for: minimum qualifications as to age, education, ability to perform physical labor and read, write and speak English; selection devices, that is, allocating point values to five categories derived from the applicant's oral interview; ranking, including notice provision and establishing a listing of eligible applicants that will be maintained for two years; a procedure for the referral of applicants to employers based on the applicant's rank on the eligibility

list; provisions for granting credit based on prior experience; and a provision to review the selection procedure to determine if the selection procedures adversely affect individuals based on sex or ethnicity.

ACTA UAP's utilization of any other selection method not in writing and not approved by DAS would be a violation of regulation and its Approved Standards. Even though evidence established that ACTA UAP has attempted to amend or revise its selection procedures, there was no evidence proffered establishing that any revision of the original selection procedures was ever approved by DAS.

Here, Mr. Paul McDonald Harrison credibly testified that the procedures actually used for apprentice selection were based on referrals from employers. That is, participating employers would refer their current employees to be enrolled in ACTA UAP's apprenticeship training program. The referred employees would be orally interviewed. After the oral interviews and the submission of paperwork, about 99 percent of those referred would be enrolled as apprentices. An eligibility list was not maintained or used. Since the individual apprentices were already employed, the apprenticeship program did not refer apprentices to jobs or maintain a referral list of eligible apprentices. The testimony of Jaima Garcia Vuscanamte, based on his personal experience, confirmed that this selection process was also used to select him into the ACTA UAP apprenticeship program in the Los Angeles area.

ACTA UAP did not proffer any evidence to rebut this testimony or to show that this method of selecting apprentices was an aberration.

Based on the submitted evidence, therefore, ACTA UAP violated its Approved Standards by not following the procedures established for the selection of apprentices. Referral lists were not maintained, and apprentices were not referred to jobs. Rather, apprentices were selected and obtained from an existing employee work force based on employer referrals. Apprentice referrals and the maintenance of eligibility lists were thus not needed or used.

ACTA UAP agreed to conform to a particular selection process that was memorialized in writing in its Approved Standards. Violation of the approved selection process is not excused or minimized simply because the process actually used might have been appropriate or approved by DAS under a different factual scenario.

ACTA UAP argued that, at least two selection processes pre-existed DAS approval of its Standards and could be used without first obtaining DAS approval. One process is known as a "hunting license" by which apprentices find their own employer to work for as opposed to being referred to that employer by an apprenticeship program. Another selection process, known as "grandfathering," enables an apprentice to work for his or her existing employer rather than be referred to a different employer. ACTA UAP, however, failed to produce any evidence that any other selection process obtained DAS approval and was included in writing as part of its Standards.[7]

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[7] ACTA UAP argues that some sort of underground regulation was being fostered by DAS with respect to "grandfathering." This is based on a misreading of Ms. Acosta's testimony. Based on the question asked, Ms. Acosta was speculating on what types of selection processes might be approved by DAS.

D. ACTA UAP'S RECRUITING OF APPRENTICES OUTSIDE OF THE GEOGRAPHICAL AREA IMPOSED BY ITS STANDARDS.[8]

ACTA UAP's Approved Standards state that the geographic coverage is for counties of Merced, Stanislaus, Mariposa and Tuolumne. This same geographic area also forms the statistical basis for affirmative action purposes.

It is undisputed that ACTA UAP enrolled new apprentices who resided in areas outside of the four-county limitations contained in the Approved Standards. In addition, ACTA UAP advertised outside of the four-county areas and had outside of area training committees. Many of the apprenticeship agreements (DAS Form 1), some dating back to 1994, show that the apprentices' residences were outside of the four-county area, and the agreement to train apprentices (DAS Form 7) were signed by employers outside of the four-county limitation.[9]

ACTA UAP asserts that its use of certain selection procedures justifies the enrollment of out-of-area apprentices. There is nothing cited by ACTA UAP in regulation or in its Approved Standards that modifies geographic area

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[8] Since not defined by regulation or statute, the definition of "recruitment" is that found at *Webster's Third New International Dictionary, Unabridged* (1967) at p. 1899.

[9] Interestingly, many of the DAS Form 7's submitted by ACTA UAP show an expanded geographic coverage under "Area covered by Apprenticeship Standards" by listing "California," "All of California," or by adding counties in addition to the four counties actually listed in the Approved Standards. There was no evidence submitted that DAS specifically approved of any geographic expansion or that approval could be obtained by simply listing greater geographic coverage on a Form 7.

by reference to selection methodology. Thus, the geographic coverage is not expanded by reference to any particular selection method or by where an enrolled apprentice is sent to work.[10]

Also, ACTA UAP claims that its efforts to sign up new employers to participate in the apprenticeship training programs was not an active recruitment of apprentices outside of the approved geographic area. This correct assertion, however, does not address the issue.

The problem is that ACTA UAP's procedure of having employers refer employees to participate in apprenticeship training as a part of the apprentice selection process, in this case, effectively operates as [sic] form of out-of-area recruitment. The result of this selection method, as seen in the DAS Form 1's and 7's, is that since an employer is out-of-area, the referred employee will usually also reside out-of-area. It does not matter whether this is termed active or passive recruitment since the process results in a violation of the Approved Standards through the enrollment of apprentices who reside outside the geographic areas as defined in the Approved Standards.

Accordingly, ACTA UAP violated its Approved Standards by recruiting and accepting enrollment of apprentices who resided outside of the four-county area set out in the Approved Standards.

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[10] ACTA UAP misinterprets Lucille Acosta's, DAS' Area Administrator for Field Offices, testimony in this regard. Ms. Acosta testified that an apprentice can work or be trained by correspondence courses anywhere in the State. Ms. Acosta did not testify that working after an apprentice was already enrolled in a training program was the same as recruiting apprentices outside of the geographic area by the apprenticeship committees or training programs.

ACTA UAP argues, however, that compliance with its Approved Standards should be waived or violation of its Approved Standards excused.

1. Constitutional Issues Raised by ACTA UAP.

ACTA UAP argues that the geographic coverage in the Approved Standards operate as an infringement on the constitutionally protected right to travel. ACTA UAP also argues that the geographic coverage in the Approved Standards that form the statistical basis for compliance with the affirmative action plan is also unconstitutional under *City of Richmond v. J.A Crossen,* 488 U.S. 469 (1989). In *Southern California Labor Management Operating Engineers Contract Compliance Committee v. Lloyd W. Aubry, Jr.* (1997) 54 Cal.App.4th 873, 887, 63 Cal.Rptr.2d 106, the Court held that "California Constitution, article III, section 3.5 provides that an administrative agency has no power to refuse to enforce a statute on the grounds it is unconstitutional or conflicts with federal law, until an appellate court has so held. (Citation omitted.)" Accordingly, ACTA UAP's arguments in this regard will not be addressed.

2. ACTA UAP's Contention That DAS' Conduct Should Equitably Estop DAS From Enforcing ACTA UAP's Approved Standards.

The evidence presented does not justify, under the doctrine of equitable estoppel, excusing ACTA UAP's compliance with its own Approved Standards or the necessity of obtaining DAS' approval to revise its Standards in terms of geographic recruiting areas.

Equitable estoppel is rarely invoked against a governmental agency *(La Societe Francaise v. Cal.Emp.Com.* (1943) 56 Cal.App. 2d 534, 555), and will not be invoked if the result will be to frustrate a strong public policy. *In Re Monigold* (1988) 205 Cal.App. 3d 1224, 253 Cal.Rptr. 120, 122. The court in *Monigold,* held that the elements of estoppel must also be present. These elements, in addition to government action, are: the governmental agency must be apprised of the true facts; the governmental agency must have intended the party to rely upon its conduct; the party must be ignorant of the true facts; and the party must rely on the agency's conduct to its detriment. *Id.*

Here, the evidence is simply insufficient to support the application of equitable estoppel against DAS. There was no testimony or evidence that DAS gave some affirmative representation to ACTA UAP or even that ACTA UAP believed that DAS approval of its proposed revisions had occurred, was no longer necessary or that ACTA UAP no longer needed to abide by its Approved Standards. There was no testimony or evidence that ACTA UAP placed any reliance on or altered its conduct in reliance on DAS' processing of apprenticeship agreements (DAS Form 1's) or any of DAS' internal memoranda.

Also, there was no evidence submitted that any of the internal memoranda circulating within DAS concerning approving apprenticeship agreements were ever actually communicated to ACTA UAP.[11] In this regard, ACTA UAP

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[11] Even had the internal memoranda been given to ACTA UAP, those memoranda cannot be read as suggesting that the Approved Standards no longer controlled, or that DAS's approval of the apprentice agreements excused compliance. This is true as to Mr. Viramontes' September 18, 2000, "To Whom It May Concern" letter as well (Resp.

(Continued on following page)

suggests that Mr. Viramontes would have supported ACTA UAP's position had he been called to testify. Neither DAS nor the Charging Party was compelled to call Mr. Viramontes as a witness and no negative inferences will be drawn from their decision not to do so.

ACTA UAP's citation to *Sawyer v. City of San Diego* (1956) 138 Cal.App. 2d 652 and *La Societe Francaise v. Cal.Emp.Com., supra,* does not change this analysis since the cases are distinguishable. In *La Societe,* the governmental taxing authority actually issued an official ruling as to the employers obligation regarding tax withholds that the employer relied upon. In *Sawyer,* there was a long history (36 years) of the City's acquiescence in water usage coupled with the City's agreement to supply water. Here, there is no specific act, agreement, or long continuing conduct on DAS' part that would lead ACTA UAP to reasonably believe that it could ignore its Approved Standards with respect to geographic coverage.

E. ALLEGATIONS REGARDING RECORDKEEPING AND FAILURE TO PAY WAGES AND CONTRIBUTIONS.

There was insufficient evidence submitted to support Charging Party's allegations that apprentices were not paid the appropriate wages in accordance with the Standards and apprenticeship agreements. Other than addressing an isolated instance, testimony did not establish any pattern of conduct relating to wage payments nor

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22). Mr. Viramontes does not say that ACTA UAP is excused from complying with its Approved Standards and, in fact, seemingly references those Standards by citing to DAS's file number for ACTA UAP.

were any documents produced to establish what amounts were paid in comparison to that which was allegedly owed for a given period.

There was no evidence submitted as to contributions to training funds. Consequently, all allegations relating to failure to pay to the correct entity or to pay appropriate amounts were not proven and must be dismissed.[12]

F. NOTIFICATION TO THE CHARGING PARTY REGARDING ACTA UAP'S PROPOSED REVISIONS.

The parties did not address this issue in their briefs even though raised in Charging Party's second complaint (99-13, First Claim) and addressed by DAS in its investigative findings. (DAS Folder 99-13.) In any event, there is insufficient evidence presented to make a finding as to this allegation. Section 212(f) provides that the proposed standards shall be served "on the sponsor of each existing program in the apprenticeable occupation in the labor market area of the program, as defined by section 215. . . ." The evidence submitted suggests that ACTA UAP's proposed standards were incomplete and returned without action. Without more, it cannot be determined what status, if any, was accorded ACTA UAP's proposed revised standards, or even if the proposal was complete within the

[12] In light of the dismissal it is not necessary to address ACTA UAP's argument that the Charging Party raised an issue of a violation of fiduciary duty under ERISA, which is preempted by federal law.

requirements of section 212. Consequently, Charging Party did not meet its burden with respect to this claim.[13]

G. REMEDIES.

Charging Party suggests that deregistration is the appropriate remedy for the violations alleged. Deregistration is within the province of the Chief of DAS under the procedures set forth in section 212.4. Section 212.4(b)(1) provides, in part, that the program sponsor be notified of a violation and the action needed to correct the violation "in writing sent by registered or certified mail, with return receipt requested." A second notice is required under Section 212.4(b)(3) in the event the program sponsor fails to correct the identified violations. While the first notice was sent to ACTA UAP in January 1997, there was no evidence submitted that DAS complied with the second notice provision set out under section 212.4(b)(3), or that other notices in compliance with regulation were subsequently sent to ACTA UAP. Consequently, deregistration cannot be ordered.

This decision, however, together with the entire record will be made available to the Chief of DAS for purposes of determining if deregistration is appropriate given the findings set forth herein that ACTA UAP failed to abide by the terms of its Approved Standards.

In summary, ACTA UAP violated its procedures for the selection of apprentices, recruited apprentices outside of the geographic limitations set forth in the Approved

[13] DAS' conclusion, however, that service is not required until DAS approves the requested geographic expansion appears to run contrary to the actual requirements of Section 212(f).

Standards and used LEAs that were not approved by DAS or set forth in its Approved Standards.

Pending a determination of deregistration under section 212.4, it is appropriate to require ACTA UAP to prospectively cease and desist from doing or engaging in the following:

1. Using apprentice selection methods other than the method specified in its Approved Standards;

2. Recruiting apprentices or utilizing selection methods that result in the recruitment or enrollment of apprentices outside of Merced, Stanislaus, Mariposa and Tuolomne counties; and,

3. Using LEAs that are not set forth in the Approved Standards.

ORDER

In light of the findings of facts and for the reasons described above, ACTA UAP is hereby ordered to:

1. Comply, in all respects, with its Standards as approved effective August 6, 1993 by the California Apprenticeship Council;

2. Cease and desist from using any apprentice selection methods not expressly approved and set forth in its Approved Standards;

3. Cease and desist from recruiting or utilizing selection methods that result in the recruitment or enrollment of apprentices who reside outside of Merced, Stanislaus, Mariposa and Tuolomne counties; and,

4. Cease and desist from using LEAs other than as set forth in its Approved Standards.

DATED: July 19, 2001

/s/ Stephen J. Smith
Stephen J. Smith, Director

DEPARTMENT OF INDUSTRIAL RELATIONS
DIVISION OF APPRENTICESHIP STANDARDS
34 Arden Way, Suite 160
Sacramento, CA 95825-2453

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Fax: (916) 263-0981
lviramontes@hg.dir.ca.gov

[SEAL]

September 18, 2000

To Whom It May Concern:

On behalf of the State of California Department of Industrial Relations/Division of Apprenticeship Standards, this letter is to certify that Air Conditioning Trades Assoc. (ACTA), is a state approved apprenticeship training facility, with coverage consisting of the entire state of California, since 1994.

ACTA is state approved to train apprentices under DAS File Number 19421.

If you have any questions please call me at (916) 263-2877.

Respectfully,

/s/ Len Viramontes, Sr. Consultant

LV:kma

State of California 455 Golden Gate Avenue, Suite 1153
San Francisco, CA 94102

Memorandum

Date: July 14, 1993

To: STAFF

From: /s/ Gail W. Jesswein
Gail W. Jesswein, Chief
Division of Apprenticeship Standards
Department of Industrial Relations

Subject: ENFORCEMENT POLICY

This finalizes, with certain modifications, the draft policy circulated in March, 1993. It reflects CAC activity through April 30, 1993, to accommodate statutes and regulations under its interpretive authority to the federal law requirements announced in the *So. Cal. ABC* Supreme Court decision.

1. DAS PROGRAM APPROVALS

A. Adverse Impact/Consultation

The portion of 8 C.C.R. § 212.2(a) regarding consultation with existing programs and notification of approvals by the Chief will be followed. However, the issues on which comments will be received are restricted to state standards or requirements for approval that carry out an explicit federal requirement.[1] The existing programs

[1] The Division has considered the Supreme Court's footnote which mentions the possibility that there might be peculiarly local adaptations of general federal requirements, whose preemption would present a more difficult question. Thus far, no such conditions unique to California have been brought to the Division's attention.

making comments should indicate not only the state law supporting their objections, but the counterpart federal requirement that would save the state law from preemption. The CAC will consider only the Appeals of the Chief's program approval which assert state law bases that are saved from preemption.

Adverse impact may no longer be taken into account for program approvals. Although the schedule of wages and benefits costs must still be submitted as part of the required Standards; and available to interested parties, these may not, indirectly or directly, be made the bases for challenges as to "adverse impact" on existing programs.

B. Need

The "need" requirement under Labor Code section 3075 is a basis for challenging program approvals, but subject to a special consideration process, pursuant to a directive of the CAC. A program that meets all other statutory and regulatory requirements for approval will be put into operation pending resolution of whether "need" is preempted, by either the State Supreme Court or the federal Ninth Court of Appeals on "ERISA" grounds. If a final holding is that "need" in Labor Code section 3075 is preempted, then the interim approval(s) will become final. If not, approval(s) shall be subject to further review by an appeals panel of the California Apprenticeship Council as to the "need" for such program.

C. Joint v. Unilateral

Programs have, in the past, been approved as "joint" although the employee representatives serving on committees were not agents of a bona fide collective bargaining

representative. This divergence between the requirements of Labor Code section 3075 and the definitions in 29 C.F.R. § 29.2(i) will be resolved by approving such programs with employee representatives who are *not* agents of a union only as "unilateral," and reserving the appellation "joint" to those where there is union representation on the JATC. Existing programs previously approved should be invited to amend their Standards to correct this misnomer.

A sponsor of a "unilateral" program who nonetheless wishes to involve employees in an advisory capacity on a committee who are not agents of a collective bargaining representative may do so, but should be counseled to consider the possible consequences under the National Labor Relations Act.

D. Wages

Although adverse impact is no longer a criteria, wages are a separate matter, albeit sometimes they have been commingled for analytical purposes by the CAC. The requirement for a progressively increasing schedule of wages in the federal standards, 29 C.F.R. § 29.5(b)(5), will be the subject of review for all entry wages set under 8 C.C.R. §§ 208(1) and (2) and 212(c)(7)(A) and (B) as follows to conform to current BAT practice under the Code of Federal Regulations:

For On-The-Job-Training (OJT) Employment On Private Work – Joint Programs –

> The entry level wage under the regulation shall be 50% of the average current journey-level wage. That wage is measured among the sponsoring contractor(s)' journeymen with whom the apprentice will be employed. 16 Ops. Cal.Atty.

Gen. 170 (1950) (Interpreting both § 3078 and § 1777.5; collecting prior opinions to 1939). In "Joint" programs the wage will ordinarily be the CBA rate. A lower percentage may be set by a collective bargaining agreement, provided that the resulting wage is not less than the current state or federal minimum wage

For OJT Employment On Private Work
– Unilateral Programs –

Where there is a Joint Apprenticeship Training Committee in the same trade in the same area (i.e., one in which the apprentices are represented by a union), and that program has exercised its option to set the percentage below 50%, then the unilateral program can use the same percentage against the average wage among its own journeypersons. However, the resulting entry level must be above the current state or federal minimum wage.

Otherwise, the general rule is that the entry level wage is 50% of the journey-level wage, measured against the average current journey-level wage of contractors participating in the program.

For OJT Employment On Public Works
– All Programs –

Both Joint and Unilateral programs follow the identical rule – the progressively increasing percentage rate in the Standards is used,[2] however,

[2] Because the percentages in the Standards are applied against the journeyperson scale on public works, it is theoretically possible that a program (most likely Unilateral, but also Joint) from an area where all programs start at 50% could leave its contractors at a disadvantage in bidding on out-of-area work (See E., below) where that area's Joint

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the journey-level rate against which the percentage is calculated is instead the journey-level rate, for that craft, which applies to that particular public work which has been determined to be prevailing.

Both the entry level and progressive wage percentages in the Standards are applied against the published previaling rate of per diem wages appliable to public works. That prevailing rate is that required for the journey-level by the state prevailing wage law on state funded jobs, Labor Code § 1771 (in the determinations pubished by the Department's DLSR), or the Davis-Bacon wages on federally funded jobs (published by the Department of Labor) for the craft or classification in the area of the site of the public work. For jobs which are funded both by state and federal monies, the higher of the two journey-level wages should be used.[3]

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programs had entry level percentages below 50%. This becomes a practical problem only where extensive out-of-area bidding occurs, and the apprentices to be used are so junior that they are at the entry level, at the different hourly cost points. Rather than revise all Standards to take such contingencies into account for the occasional out-of-area public works bid, the CAC has proposed uniform percentages for Standards, in a regulation sent to rulemaking this April 30. If the rulemaking does not progress and the problem appears significant, this issue will require re-visiting.

[3] The CAC formal rulemaking addresses a different system to set apprentice wages. How that new system conforms to *So. Cal ABC.* and current legal requirements will be reviwed in the rulemaking process. If a replacement for the above is enacted, or the foregoing is disapproved in proceedings before the CAC, that change will be the subject of later notification.

E. Geographic Area

The statement of the geographic area within which the Standards apply, 8 C.C.R. § 212(b)(2), is not a limitation as to the area within which an apprentice may be employed. It is required for programs to be approved in order to monitor two federally required criteria – recruitment and related and supplemental instruction. Thus, the statement of the program's geographic area in its Standards does not limit the area in which recognize apprentices can work.

The first reason geographic area need be specified in the Standards is that both state and federal regulations require verfification that the apprentice will receive organized, related, and supplemetnal instruction (RS&I), 29 C.F.R. § 29.5(b)(4) and 8 C.C.R. § 212(a)(3). When an apprentice's On-The-Job (OJT) training employment location is remote from the RS&I classroom location, special arrangements, subject to DAS approval, must be made to ensure continuity of the related and supplemental instruction.

A second reason is that a statement of geographic area is required to specify the area of recruitment, against which the mandatory affirmative action requiremetns are measured. 29 C.F.R. §§ 30.1, et seq., requires local outreach and recruitment, as well as goals and timetables, keyed to the sponsor's labor market area. 29 C.F.R. § 30.4(c)(1), (e), (g); 8 C.C.R. Appendix to § 215. "Geographic area" means that area of applicant recruitment and selection.

Therefore, in existing Standards, a statement of geographic area for recruitment, and within which RS&I classroom training occurs, should be updated when the

area of those activities expands. It is optional to change the Standards to specify the out-of-area range within which apprentices may be offered a dispatch to OJT work, as contractors secure jobs.

F. Ratios

Numerical ratios of apprentices to journeypersons will continue to be set, according to the particular trade's requirements for proper supervision, training safety, and continuity of employment, 8 C.C.R. § 212(b)(6), 29 C.F.R. § 29.5(b)(7), and the impact of the ratio on continuity of employemnt will continue to be a factor, § 212(b)(7) and § 29.5(b)(7). A ratio in the Standards, whether manditory or voluntary, applies equally to public and private work when apprentices are used on the job, even if their use is not statutorially or contractually compelled.

2. DAS PUBLIC WORKS ENFORCEMENT

A. Ratio/Mandatory Hiring

The CAC has directed that contractor debarments for willful violation of the requirements of Labor Code section 1777.5 as to failure to observe the mandatory minimum ratio of apprentices to journepersons be processed in light of an intervening Supreme Court case on the issue of preemption generally, *Building and Construction Trades Council and Mass. Water Resources Auth. v. ABC of Mass.*, ___ U.S. ___, 111 S. Ct. 1190 (1993). The DAS will investigate allegations of violation of sections of the Labor Code concerned with employment of apprentices on the public works – the requirement that contractors request apprentices on work which required the minimum 20% of hours in section 1777.5; the requirement to notify local committees of

contract awards; and complaints against programs for refusals to provide apprentices to contractors, 8 C.C.R. §§ 230, 230.1.

The requirement of section 1777.5 that contractors agree to abide by the Standards of the local program from which they secure apprentices remains modified by the Council's regulations, 8 C.C.R. § 230.1(a), in light of the express holding of *Hydrostorage*. That interpretation of section 1777.5 was not affected by CAC's action and is governed by CAC's current regulations. Therefore, no violations alleging failure to sign on to the existing program's Standards should be pursued.

B. Fringe Benefits/ERISA Trust Funds

Similarly, based on the *Hydrostorage* decision and the CAC's regulation in response to that decision, the requirement of 8 C.C.R. § 230.2 and Labor Code section 1777.5 that contractors contribute apprenticeship training funds to the CAC, with an option to take credit for contributions to an approved apprenticeship committee in which the contractor participates, remains in effect. The DLSE Enforcement Policy of this same date addresses, separate from the contrbituion required by 8 C.C.R. § 230.2, issues of amount and conditions for other training contributions to be credited in partial satisfaction of the general prevailing rate of per diem wage obligation.